

NATIVE AMERICAN AFFAIRS AND THE DEPARTMENT OF DEFENSE

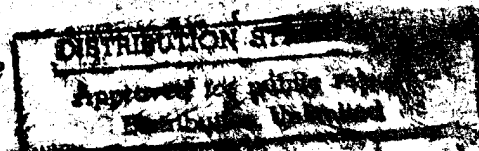
Donald Mitchell • David Rubenson

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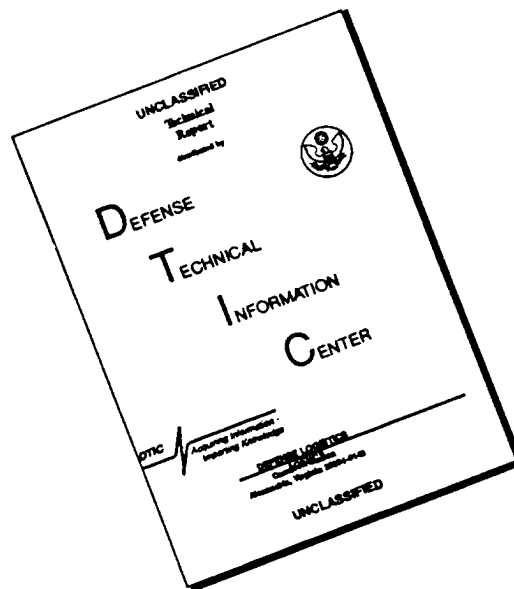
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Donald Mitchell • David Rubenson

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Office of the Secretary of Defense

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PREFACE

This report reviews the implications for the Department of Defense of recent statutes and regulations affecting Native Americans, growing political awareness and activism, and the U.S. Army's historical role in Indian affairs. The report is part of a larger study being conducted for the Principal Assistant Deputy Under Secretary of Defense (Environmental Security) on conservation policy as it relates to the Department of Defense's natural and cultural resource program.

It should be of interest to those charged with responsibility for the natural and cultural resource program as well as to those concerned with Native American affairs and federal land management. The project was conducted within the Acquisition and Technology Policy Center of RAND's National Defense Research Institute, a federally funded research and development center sponsored by the Office of the Secretary of Defense, the defense agencies, and the Joint Staff.

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SUMMARY

THE PRESIDENT'S APRIL 29, 1994 MEMORANDUM

On April 29, 1994, President and Mrs. Clinton, Vice President and Mrs. Gore, and every member of the President's cabinet (other than the Secretary of State) met with more than 300 Native American¹ leaders of "federally recognized Indian tribes" on the south lawn of the White House. It was the first time in the nation's history that a President of the United States had held such a meeting.

During the meeting, the President signed a memorandum directing the heads of all executive branch departments and agencies to

- "operate within a government-to-government relationship with federally recognized tribal governments"
- "consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments"
- "assess the impact of federal government plans, projects, programs, and activities on tribal trust resources and assure that

¹The term Native American means citizens of the United States who are of American Indian, Alaska Native, or Native Hawaiian ancestry. Some Native Americans are members of federally recognized Indian tribes, and others are not. Congress has enacted statutes that benefit Native Americans generally and other statutes that benefit specific groups of Native Americans—members of federally recognized Indian tribes, Alaska Natives and so forth.

tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.”²

IMPLICATIONS OF THE PRESIDENT’S MEMORANDUM FOR DoD

The Department of Defense (DoD) has a comprehensive natural and cultural resource program that incorporates a wide range of responsibilities that Congress, the President, and sometimes the states have assigned to DoD for the protection of natural and cultural resources on DoD agency-managed land.

The directives contained in the President’s April 29, 1994 memorandum are to be carried out within DoD’s natural and cultural resources program and are only some of many binding requirements. The way in which the above directives are implemented in the field may vary with such factors as the competing demands imposed by other natural and cultural resource obligations, the individual personalities of DoD installation commanders, the continual rotation of assignments, the DoD land managers’ understanding of the reasons the President issued his April 29, 1994 memorandum, and the extent to which it is recognized that vigorous implementation of the memorandum will materially advance DoD’s achievement of its natural and cultural resources protection obligations.

It is thus critical for DoD personnel—at many levels of organization—to gain a better understanding of the implications of the President’s memorandum for the Department. To give installation commanders and land managers a better understanding of the historical and political circumstances that motivated the President to issue his memorandum, we attempt to answer the following questions:

1. Does the President’s April 29, 1994 memorandum reflect a change in Congress or the federal executive branch’s political relationship with Native Americans and federally recognized Indian tribes? If so, the DoD agencies should be aware of it.

²Office of the White House, Memorandum: “Government-to-Government Relations with Native American Tribal Governments,” April 29, 1994.

2. Other than the President's directive that they do so, what reasons does DoD have to implement the April 29, 1994 memorandum?
3. What is the nature of the statutes that require DoD agencies to preserve Native American cultural resources and to involve Native Americans generally—and representatives of "federally recognized Indian tribes" particularly—in DoD agency decisionmaking?
4. How should the DoD agencies interact with Native American groups that are not federally recognized tribes?

A CHANGING RELATIONSHIP

Our central observation is that the President's April 29, 1994 meeting with the leaders of the nation's federally recognized Indian tribes symbolizes the growing ability of Native American leaders to influence the development and implementation of federal policies that affect their indigenous constituencies.

During the latter half of the 19th and the first half of the 20th centuries, non-Native American representatives of white "friends of the Indian" organizations were the most influential spokespersons for Native Americans on Capitol Hill and inside the executive branch of the federal government. However, in the 1960s a new generation of Native American leaders emerged who over the past three decades have gained increasing skill in articulating Native American concerns and in influencing the development and implementation of Native American-related congressional and executive branch policies.

Of coequal importance, since 1969 an expanding public interest in Native Americans and their problems has facilitated the ability of Native American leaders to participate in the development and implementation of Native American-related congressional and executive branch policies, and has assisted Native American leaders in developing bipartisan support for Native American programs and policies in the Congress.

We have included two case studies—one from Idaho and another from Alaska—to illustrate the challenges that implementation of federal Native American-related policies can present for DoD installation commanders and land managers in the field. The studies show that morally compelling concerns of Native Americans can be

combined with the organizational capability of environmental activists and others to create a political synergy of considerable consequence to the attainment of DoD land management objectives.

TREATIES AND STATUTES

Through its ratification of treaties and enactment of statutes, Congress has imposed numerous Native American-related obligations on DoD agencies. Many of those obligations are similar in their legal structure to those implied by certain natural resource protection laws. They emphasize planning and self-enforcement, and have indirect—though potentially binding—mechanisms of enforcement.

This report reviews the major statutes that require DoD installation commanders and land managers to address Native American concerns, and demonstrates how implementation of the directives contained in the President's April 29, 1994 memorandum can materially advance DoD agency implementation of Native American-related treaty and statutory obligations.

HISTORICAL CONSIDERATIONS

DoD agencies and Native Americans share a common belief in the importance of history. Two components of DoD agencies' past involvement with Native Americans can facilitate DoD installation commanders' and land managers' understanding of the President's policy objectives as well as their understanding of the motivations of Native American leaders.

The first component is the unusually large number of Native Americans (as a percentage of the Native American population) who have served in the armed services, which we believe establishes a compelling justification for DoD installation commanders and land managers to vigorously implement the President's memorandum.

The second component is the United States Army's participation in implementing Congress' Indian policies during the 18th and 19th centuries. We discuss the common elements of that history, recognizing that each federally recognized Indian tribe and each Native American group that has not been federally recognized has its own history of involvement with the federal government during the 18th

and 19th centuries. DoD installation commanders and land managers who interact with representatives of a particular tribe or Native American group should be aware of the role history may play in the current perspectives of that particular tribe.

TRIBES NOT FEDERALLY RECOGNIZED

One of the greatest challenges DoD officials will face in implementing the President's directive is to arrive at an approach for interacting with Native American groups that are not federally recognized tribes.

Because the memorandum directs DoD to "operate within a government-to-government relationship with federally recognized tribal governments" and to "consult . . . with tribal governments," the threshold challenge is to identify Native American groups that are "federally recognized Indian tribes."

The second major challenge is to develop a policy for dealing with and consulting Native American groups that are not federally recognized Indian tribes but with which statutes such as the Native American Graves Protection and Repatriation Act and the Alaska Native Claims Settlement Act require DoD agencies to interact. The development and implementation of such a policy are particularly important with respect to DoD agency relations with Alaska Natives and Native Hawaiians, whose history of involvement with the United States government is different from that of Native Americans who reside in the coterminous states.

We conclude this discussion with a case study from Camp Pendleton, California, that illustrates the importance of having a policy for interacting with Native American groups that are not federally recognized Indian tribes.

CONCLUSIONS AND RECOMMENDATIONS

Our general argument is that the importance of Native American affairs to the Department of Defense is growing. Just as environmental affairs became a major DoD concern in the late 1980s, a number of factors signal the need to pay increased attention to Native American affairs in the next decade. The DoD should interpret the President's meeting on the White House lawn as symbolic of this.

We argue that the questions posed above should be answered in the following way.

1. The President's directive reflects the growing ability of Native American groups to access the political process and ensure that their interests are represented in legislation. Although there seems to be no congressional interest in financing a broad-based program to remedy the problems of Indian life in America, this increased political influence can result in legislation that has important implications for DoD facilities.
2. The President's directive provides an overarching strategy for addressing diverse and sometimes unpredictable issues that can affect DoD interests and goals. These diverse issues include the potential for Native American claims to affect DoD land-use goals (particularly when the moral strength of these claims is combined with the organizational capability of environmental groups and other well-organized users of the public lands), the potential for some to assert that the Army's historical role implies special obligations for the DoD, and the need to fulfill a variety of statutes related to Native American affairs.
3. A number of statutes obligate DoD to protect Native American artifacts, religious sites, and historic monuments. As with natural resource laws, these laws are far less prescriptive than environmental laws and require a degree of planning and self-enforcement. This implies that they may have low priority in DoD's natural and cultural resource program. However, the political effectiveness discussed above suggests that there may be increased use of these laws by Native Americans and other advocacy groups when seeking to modify federal agency activity. The President's directive provides a general approach to addressing the combined legal, political, and historical aspects of Native American affairs.
4. Although federal recognition is the first test for determining whether consultation is required, there are many unrecognized tribes for which consultation would be in DoD's self-interest. Many statutes already contain obligations to tribes beyond those that are federally recognized. DoD will need to develop tools that facilitate a better understanding of which nonrecognized tribes

have legitimate claims and which do not. DoD must be particularly sensitive to these issues in Alaska and Hawaii.

To respond to these general observations, we recommend that the following actions be taken to implement the President's April 29, 1994 memorandum and to improve DoD's working relationship with Native Americans:

- DoD and the services should develop a written policy to guide DoD installation commanders' and land managers' implementation of the President's memorandum. In particular, the policy should instruct DoD installation commanders and land managers to inform the leaders of local federally recognized Indian tribes of their commitment to working with such tribes on a "government-to-government" basis. The policy should recognize that some non-federally recognized tribes should receive the same commitment.
- To begin developing capabilities for determining which nonrecognized tribes have valid claims, histories and maps of prior Native American use of DoD agency-administered land should be made available. Such maps and histories should be useful in preparing for consultations with recognized tribes and in implementing relevant statutes.
- DoD installations should designate a coordinator for Native American affairs to help retain institutional memory and policy expertise. Currently, installations typically rely on the staff archaeologist, who may not have the inclination and training to probe into the policy aspects of Native American affairs.
- DoD should communicate its intention to develop and implement the policies described in the first two bullets above in a highly visible and politically symbolic manner. In 1944, leaders of thirty federally recognized Indian tribes organized the National Congress of American Indians (NCAI). Today, NCAI is recognized by Native Americans as the spokesorganization for all of the nation's federally recognized tribes. NCAI holds an annual national convention. At the 1994 convention, Vice President Gore delivered the keynote address, during which he reaffirmed the President's commitment "to working diligently and respectfully to help American Indians control their destiny, and to pre-

serve the land of their ancestors.” The Secretary of Defense or other high-ranking DoD official should consider addressing a future NCAI convention to convey DoD’s commitment to implementing the President’s April 29, 1994 memorandum and to communicate DoD’s intention to develop and implement the policies.

- In consultation with federally recognized Indian tribes and other appropriate Native American groups, the Army historian or a panel of military historians should develop materials that will enable DoD personnel to understand and to respond to questions from both the Native American community and the public regarding the Army’s historical role in implementing Congress’ 18th and 19th century Indian policies.

In summary, DoD should expect that Native American affairs will be of growing importance to the department, changing from the need to meet a few loosely enforced statutes to a larger awareness involving core DoD interests and goals. DoD will need to develop new capabilities and an increased level of organizational attention.

Chapter One

INTRODUCTION

On April 29, 1994, President and Mrs. Clinton, Vice President and Mrs. Gore, and every member of the President's cabinet (other than the Secretary of State) met with more than 300 Native American¹ leaders of "federally recognized Indian tribes" on the south lawn of the White House. It was the first time in the nation's history that a President of the United States had held such a meeting.

The purpose of the meeting was two-fold: to provide the President an opportunity to hear leaders of the nation's federally recognized Indian tribes assess the shortcomings of federal Native American policies and programs, and to allow the President to express his commitment to working with tribal governments to safeguard Native American religions and cultures and to improve the economic status of tribal members. The President, during the meeting, described the scope of that commitment:

[O]ur first principle must be to respect your right to remain who you are, and to live the way you wish to live. And I believe the best way to do that is to acknowledge the unique government-to-government relationship we have enjoyed over time. Today I reaffirm our commitment to self-determination for tribal governments. I pledge to fulfill the trust obligations of the federal

¹The term Native American means citizens of the United States who are of American Indian, Alaska Native, or Native Hawaiian ancestry. Some Native Americans are members of federally recognized Indian tribes. Others are not. Congress has enacted statutes that benefit Native Americans generally and statutes that benefit specific groups of Native Americans—members of federally recognized Indian tribes, Alaska Natives, Native Hawaiians, and so forth.

government. I vow to honor and respect tribal sovereignty based upon our unique historic relationship. And I pledge to continue my efforts to protect your right to fully exercise your faith as you wish . . . *It is the entire government, not simply the Department of the Interior*, that has a trust responsibility with tribal governments. And it is time the entire government recognized and honored that responsibility.² [Emphasis added.]

To give substance to the rhetoric, when he concluded his remarks the President signed a memorandum that directs *all* executive departments and agencies to

- “operate within a government-to-government relationship with federally recognized tribal governments”
- “consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments”
- “assess the impact of federal government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.”³

The Department of Defense has numerous policies for implementation of statutes affecting Native Americans, but no overall policy to guide installation commanders and personnel as to the appropriate approach for consulting and interacting with Native American groups.⁴ Undoubtedly, there are unique DoD-related factors that may lead the DoD leadership to modify and amend the above state-

²Office of the White House Press Secretary, *Transcript of Remarks by the President in Historic Meeting with American Indian and Alaska Native Tribal Leaders*, April 29, 1994.

³Office of the White House, Memorandum: “Government-to-Government Relations with Native American Tribal Governments,” April 29, 1994.

⁴There is no overarching DoD policy. A draft policy formulated in 1994 carried out the essence of the President’s directives, but it never became official policy. The Air Force formulated guidelines in 1991 that called for consultation with both federally recognized and non-federally recognized tribes but did not mention the “government-to-government” relationship. The Army Environmental Center has recently formulated a draft policy that calls for government-to-government consultations with federally recognized tribes but does not mention other tribes.

ments in the process of formulating a DoD policy that remains true to the above objectives. However, the President's directive highlights the absence of an overall DoD policy as well as DoD's lack of attention to this issue.

The President's April 29, 1994 memorandum and the void in DoD policy could have important policy implications. Collectively, DoD agencies administer 25 million acres of public land. Every acre of DoD agency-administered public land once was occupied by members of Indian tribes that held "aboriginal title" to the land prior to Congress' extinction of that title. Tribal members today still hunt and fish and otherwise use considerable DoD agency-administered acreage.

For those reasons, implementation of the President's memorandum will provide DoD agencies an opportunity to improve their working relationships with representatives of federally recognized Indian tribes and possibly other Native American organizations whose members have both an historical and a present-day interest in DoD agency-administered public land.

The President's memorandum does not create new legal mandates. Rather, it reemphasizes the preexisting duty of DoD agencies to involve representatives of federally recognized Indian tribes in agency implementation of statutes and agency development of "plans, projects, programs, and activities" that affect the interests of tribal members, particularly in the protection of natural resources and the preservation of cultural resources located on DoD agency-administered public land.

In recent years, DoD has made important strides in developing and implementing programs to protect natural resources and preserve cultural resources on DoD agency-administered public land. However, the development of those programs has been costly, in financial terms, in terms of the need for command attention, and in terms of its impact on organizational culture. Implementation has imposed unfamiliar responsibilities and institutional obligations on DoD personnel that have resulted in such programs being questioned during debates on "nondefense" functions funded in the DoD budget. As a consequence, DoD implementation of natural resource protection and cultural resource preservation programs has

emphasized the attainment of policy objectives that are clearly identified by statute.⁵ Statutes with well-defined obligations, a regulatory and enforcement structure, and well-defined penalties tend to receive the highest priority.

DoD installation commanders and land managers will be guided by the President's April 29, 1994, memorandum in implementing DoD's natural resource protection and cultural resource preservation programs. However, because of limitations on staff size and training, and the priority given to statutes with highly specific mandates, the President's directives may not receive significant attention within DoD. Nonetheless, the symbolism emanating from the memorandum and the signing ceremony suggests that the DoD might more carefully examine the memorandum and its long-term implications for the department. To help the DoD understand these implications, we posed the following questions:

1. Does the President's April 29, 1994 memorandum reflect a change in Congress' or the federal executive branch's political relationship with Native Americans and federally recognized Indian tribes? If so, the DoD agencies should be aware of it.
2. Other than the President's directive that they do so, what reasons does DoD have to implement the April 29, 1994 memorandum?
3. What is the nature of the statutes that require DoD agencies to preserve Native American cultural resources and to involve Native Americans generally—and representatives of federally recognized Indian tribes particularly—in DoD agency decisionmaking?
4. How should the DoD agencies interact with Native American groups that are not federally recognized tribes?

Chapter Two of this report places the President's remarks to tribal leaders and the directives contained in his April 29, 1994 memorandum in a context that reflects the public's awareness of, and Congress' interest in, Native Americans and their problems. Chapter

⁵For a description of DoD's land management challenge, the organizational obstacles, and the emphasis on the achievement of objectives mandated by statute, see David Rubenson, Jerry Aroesty, and Charles Thompson, *Two Shades of Green: Environmental Protection and Combat Training*, RAND, R-4220-A, 1992.

Three describes the historical considerations that have led some to believe that DoD agencies have a special obligation to be responsive to Native American concerns. Chapter Four discusses treaties and identifies statutes that impose legal obligations regarding Native Americans on DoD agencies. Chapter Five describes the challenges DoD installation commanders and land managers can be expected to face in implementing the President's memorandum. Finally, Chapter Six sets forth recommendations that will facilitate DoD agency implementation of the President's directives.

THE POLITICAL CONTEXT

OVERVIEW

In this chapter we discuss the context in which the President's April 29, 1994 meeting with Native American leaders of federally recognized Indian tribes occurred. In doing so, we show that the meeting symbolizes the ability of Native American leaders to influence Native American-related congressional and executive branch policy, and show that the influence Native American leaders wield on Capitol Hill and in the executive branch is a consequence of two decades of Native American political activism and strong public interest in Native Americans and their problems. Because many DoD facilities are located near large Native American populations, this political effectiveness can have important implications for the DoD.

NATIVE AMERICAN POLITICAL ACTIVISM

From the 1860s when Congress embarked in earnest on its policy of trying to "solve the Indian problem" by confining Native Americans who resided in states located west of the Mississippi River on reservations until the beginning of the Nixon administration in 1969, non-Native American representatives of white "friends of the Indian" organizations were the most influential spokespersons for Native Americans on Capitol Hill and inside the executive branch of the federal government. During the latter half of the 19th century, most white "friends of the Indian" were clergymen. In the first decades of the 20th century, the clergy was replaced by whites who were members of, or who were employed by, Indian rights advocacy groups

whose boards of directors were composed principally of wealthy Easterners who romanticized Indian life and who considered their efforts to improve social and economic conditions on the reservations to be a philanthropy akin to supporting the opera.¹

In the late 1960s, advocacy by non-Native American representatives of "friends of the Indian" organizations began to be supplemented, and then was replaced, by advocacy conducted by Native Americans themselves (and non-Native American attorneys who worked directly for particular tribes).

The change of circumstance had two related causes. First, in 1965 participation in the Economic Opportunity Act (OEO) of 1964 required Native American leaders of "federally recognized Indian tribes" to begin to deal with federal agencies other than the Bureau of Indian Affairs (BIA).

In 1983, Sam Deloria, the director of the American Indian Law Center, described the consequence:

Previously, tribal delegations that came to Washington would spend their time in the [Bureau of Indian Affairs] or up on Capitol Hill. But during the peak days of the OEO, they would stop by the Bureau to say hello to the Commissioner on their way back to the airport. The Economic Opportunity Act did not provide for tribal eligibility for [OEO] Community Action Programs; that was an administrative determination. But out of that flowed not only tribal control of funds but the practice of tribes calling on federal agencies throughout Washington to do their share of dealing with Indian problems. The flood of federal money onto reservations drastically changed the nature of tribal government by creating a bureaucracy, and tribes acquired experience in administering federal funds, BIA contracts, and tribal income. Many present-day Indian leaders received their training on the job as program administrators. There, they gained

¹In 1933, President Franklin Roosevelt appointed one of the most prominent white "friends of the Indian," a dour social worker named John Collier, as his Commissioner of Indian Affairs. In 1934, Collier and Felix Cohen, an attorney who served as the Department of the Interior's in-house Indian policy theoretician, lobbied the Indian Reorganization Act through Congress, which today remains the foundation for the U.S. "government-to-government" relationship with "federally recognized Indian tribes."

valuable administrative experience and learned the art and skill of government.²

Second, during the same years, a new generation of Native American leaders came of age whose political consciousness was expanded daily by observing the successes that civil rights and anti-war activists were achieving by organizing public protests of government policies with which they disagreed.

After learning the lessons that the civil rights and antiwar activists had to teach, the new young Native American leaders repudiated the tradition of subservience that had characterized their elders' acquiescence to the edicts of the Bureau of Indian Affairs. And they ended Native American reliance on "friends of the Indian" organizations to communicate Native American grievances to Congress and to executive branch officials. Instead, the new generation marshaled public opinion in the service of the Native American cause through a series of media events that began with the December 1969 occupation of Alcatraz Island, the abandoned federal penitentiary in San Francisco Bay, which, in February 1970, resulted in a *Time* magazine cover story that featured the plight of the American Indian and the new Native American militancy. Again to quote Sam Deloria:

A resurgence of Indian cultural awareness captured the nation's imagination during this period. The fishing rights struggle in the Pacific Northwest had an enormous impact on the public consciousness and on tribal and individual [Native American] self-awareness. The [1972] Trail of Broken Treaties, the BIA building episode [the occupation of the Bureau of Indian Affairs headquarters by Indians who had assembled in Washington, D.C., at the end of the Trail of Broken Treaties], the American Indian Movement, and Wounded Knee II put Indians on the world stage. These events had an impact on both the Indian people and American society that we still lack the perspective and detachment to measure.³

²Philip S. Deloria, "The Era of Indian Self-Determination: An Overview," 1983; reprinted in Kenneth R. Philip, *Indian Self-Rule: First-Hand Accounts of Indian-White Relations from Roosevelt to Reagan*, Howe Brothers, Salt Lake City, Utah, 1986, pp. 197-200.

³Deloria, p. 203.

Today, the mass audience success of films such as "Dances with Wolves" and television programs such as the recent Turner Broadcasting System series on the nation's "Forgotten Americans" signifies that the public's interest in Native Americans and their problems has, if anything, grown during the quarter of a century since the birth of the new Native American political militancy on Alcatraz Island.

THE LEGISLATIVE CLIMATE

While their ability to influence the development of Native American-related policy on Capitol Hill and inside the executive branch of the federal government has increased dramatically over the past three decades, Native American leaders have not been able to persuade Congress to launch (or, more significantly, to finance) a broad assault on the problems rife in "Indian Country." Nevertheless, the political influence Native American leaders do now wield on Capitol Hill has important implications for DoD.

In 1946 the Senate and the House of Representatives disbanded their Committees on Indian Affairs. Since the days of the Continental Congress, these committees had exercised legislative jurisdiction over the myriad—and uniformly unsuccessful—congressional schemes to "solve the Indian problem." The committees' jurisdiction was now transferred to subcommittees of the Senate and House Committees on Interior and Insular Affairs, where the legislative mission—"solving the Indian problem"—survived until 1977.

Responding to demands of the new Native American political activists that it do so, in 1975 Congress established the American Indian Policy Review Commission, which two years later submitted a report that contained 206 recommendations for pro-Indian legislative action. To implement the recommendations, the Senate created a temporary Select Committee on Indian Affairs, which became permanent in 1984. Of coequal importance, unlike the subcommittee it replaced, the Committee on Indian Affairs (as the Select Committee

has been renamed) functions as the Native Americans' advocate inside the Senate.⁴

The Committee's advocacy role has two important consequences for DoD. First, the Committee has sponsored pro-Native American legislation that has imposed statutory mandates on DoD agencies. For example, in 1990 Congress enacted the Native American Graves Protection and Repatriation Act,⁵ which Senator John Melcher of Montana, who at the time was the ranking Democrat on the Committee on Indian Affairs, introduced in 1986.⁶ Second, a number of senators who are senior members of the Committee on Indian Affairs also are members of the Senate Armed Services Committee or of the Senate Defense Appropriations Subcommittee. Senator John McCain, the chairman of the Committee on Indian Affairs, whose constituency in Arizona includes numerous Indian tribes, is the fourth ranking Republican member of the Armed Services Committee.⁷ Senator Daniel Inouye of Hawaii, the Committee on Indian Affairs' ranking Democrat and the most outspoken spokesperson for Native American rights in Congress, is the ranking Democrat on the Senate Defense Appropriations Subcommittee. And Senator Pete Domenici of New Mexico is a senior member of both the Committee on Indian Affairs and the Defense Appropriations Subcommittee.⁸

⁴In the House of Representatives, a subcommittee of the Committee on Resources continues to exercise legislative jurisdiction over Indian legislation. Although the subcommittee has a smaller staff than the Senate Committee on Indian Affairs, the members and staff of the House subcommittee similarly see themselves as advocates for Native American interests.

⁵Public Law No. 101-601, 104 Stat. 3048 (codified at 25 USC 3001-13) (1990).

⁶132 Congressional Record 33, 840 (1986).

⁷While they are not members of the Committee on Indian Affairs, Senators James Inhofe of Oklahoma, Jeff Bingaman of New Mexico, and Richard Bryan of Nevada, each of whom has a large Native American constituency in their home state, are members of the Senate Armed Services Committee.

⁸Senator Ted Stevens of Alaska, the chairman of the Senate Defense Appropriations Subcommittee, is not a member of the Committee on Indian Affairs. However, Stevens has a large home-state Native American constituency, has long been active in the development of Indian policy, and has a close personal relationship with Senator Inouye, which Senator Inouye frequently puts to useful service on behalf of Native Americans and their issues.

The senators' memberships on the Armed Services Committee and the Defense Appropriations Subcommittee provide Native American leaders with a means to influence the writing of DoD legislation. To cite one example, Section 8026 of the FY 1991 Department of Defense Appropriations Act prohibits DoD agencies from contracting for the performance of any activity or function that is performed by more than ten DoD civilian employees until an organizational analysis of the activity or function has been completed.⁹ However, Section 8026 exempts a DoD agency from compliance with the prohibition in three circumstances, the third of which is when it contracts an activity or function to a firm that has "51 percent Native American ownership." Since Senator Inouye was chairman of the Committee on Indian Affairs and of the Senate Defense Appropriations Subcommittee when Section 8026 was enacted, the inclusion of a special opportunity for Native American businesses in the FY 1991 Appropriations Act was not a happenstance.

THE IMPACT ON DoD AGENCY LAND MANAGEMENT

Federally recognized Indian tribes and other Native American organizations also can affect DoD agency land management decision-making in the field, particularly when an affected tribe or Native American organization and interested environmental organizations coordinate their activities to advance the attainment of common political objectives.

The 50 states contain 2.27 billion acres of land. Of that amount, 650 million acres of public land is owned by the United States, 25 million acres of which are administered by DoD agencies. The other 625 million acres are administered by other federal agencies, principally the Bureau of Land Management and the National Park and U. S. Fish and Wildlife Services inside the Department of the Interior, and the National Forest Service inside the Department of Agriculture.

The Department of Defense manages 25 million acres of federal land. About 16 million acres of this land is withdrawn from the public domain under varying conditions for return to the public domain and the extent to which it may be accessed by the public. The military

⁹Public Law No. 101-511, Section 8026, 104 Stat. 1856, 1880 (1990).

services will also make occasional requests for temporary use of other lands and virtually any expansion or rearrangement of DoD lands will involve accessing lands that are now in the public domain.

If a DoD agency's use of its own land, of withdrawn public land, or of public land administered by a non-DoD agency may affect members of a federally recognized Indian tribe, the President's April 29, 1994 memorandum requires the DoD agency to consult with the tribe prior to using the land. Independent of the memorandum's admonition that the agency do so, consultation is a sound and cost-effective policy that will advance the agency's accomplishment of its mission.

The reason is simple.

From the view out the window of an F-15 aircraft overflying Alaska or the 22 coterminous states west of the Mississippi River, most of the land (largely public land owned by the United States) appears uninhabited. However, contrary to appearance, every acre of public land in Alaska and the western states has been allocated (in a political sense) to one or more of the groups whose members use the public domain—ranchers, mining companies, timber companies, hunters, river runners, wilderness area backpackers, mountain bike enthusiasts, four-wheel-drive off-road dune buggy owners, fly fishermen, and so forth.

Each of the aforementioned groups has a trade association or non-profit organization that employs lobbyists, attorneys, and professional staff to represent its members' interests on Capitol Hill, inside the executive branch, and in the states where the public land in which the groups' members claim an interest is located—a fact of political life that has serious consequences for DoD agencies' use of public land for defense purposes.

Simply put, any DoD agency that asks a non-DoD agency for permission to use public land that the non-DoD agency administers can expect that its request will be opposed by one or more groups whose members claim an interest in the same acreage. For that reason, prior to making such a request, the DoD agency should identify the groups that can be expected to assert an interest, take the legitimate interests of those groups into account, and, to the extent practicable, accommodate their interests.

Of the groups holding an interest in public land, many believe that Indian tribes have the most compelling claims because their members' ancestors used the land for generations before Congress extinguished their aboriginal title.

For that reason, tribal members who hunt or graze sheep or cattle or otherwise use DoD or non-DoD agency-administered public land have a stronger moral argument that their use of the land should not be curtailed or disrupted (even if this result inconveniences DoD agencies) than do other groups that claim an interest in the public land. As the following case studies demonstrate, other groups (particularly environmental organizations) recognize that fact, and frequently include Indian tribes in their efforts to disallow DoD agencies from using public land in which the groups' members claim an interest.

Idaho Training Range

The Air Force has recently been forced to abandon long-held plans to establish an Idaho Training Range (ITR) in the southwest corner of the state. Although a legal suit related to procedural implementation of the National Environmental Policy Act (NEPA) was the immediate cause of the Air Force's decision to abandon plans for the range, the decision was the culmination of lengthy political controversy in which Native American concerns played an important role.

The purpose of the range was to expand the area available to train flight crews stationed at Mountain Home Air Force Base and Gowen Field near Boise. Aircraft participating in training sorties would have delivered training ordnance to target areas inside the range, as well as set off flares. The aircraft would have flown at supersonic speed and at low altitude.¹⁰

Idaho environmental and sportsmen's organizations opposed the establishment of the training range because of the damage they believed training exercises would have inflicted on 13,000 acres of Bureau of Land Management-administered public land located

¹⁰See United States Air Force Air Combat Command, *Draft Environmental Impact Statement Draft Plan Amendment: Idaho Training Range*, 1993.

within the boundaries of the proposed range and on the bird and wildlife populations that occupy it. To coordinate their effort to prevent the range from being established, the organizations established an umbrella group called the Owyhee Canyonlands Coalition (OCC).

Shoshone and Paiute Indians who are members of federally recognized Indian tribes reside on the Duck Valley Indian reservation, which straddles the Idaho-Nevada border a few miles east of the proposed training range. Tribal members opposed the establishment of the range for the same reasons environmentalists and sportsmen opposed it. However, the tribal members' opposition had a stronger moral underpinning than the environmentalists' and sportsmen's opposition because Native American archaeological sites, grave sites, and religious sites were located inside the boundaries of the proposed range.

Although the tribe did not join the OCC, cooperation between tribal representatives and representatives of the environmental and sportsmen's organizations that are members of the OCC "fostered itself,"¹¹ and, in the court of public opinion, the OCC argued the tribe's case as well as its own. As the *Los Angeles Times* subsequently described the OCC's grievances: "[E]nvironmentalists charge that convenience for the Air Force does not outweigh the dangers to wildlife, *Native American culture* and scenery that the Idaho Bomb Range poses."¹² (Emphasis added.)

The commonalty of interest between the OCC and the Shoshone and Paiute Indians who reside on the Duck Valley reservation is not an isolated event. The advocacy of Native American concerns by environmental organizations that oppose DoD agency requests to use non-DoD agency-administered public land frequently occurs.

Alaska Airspace

Since the closing of Clark Air Base in the Philippines, Alaska has been the Pacific Air Forces' principal training area. For that reason, to fa-

¹¹Personal communication from OCC staff member Brian Goller (January 13, 1995).

¹²Melissa Healy, "Idaho Tug-of-War Pits Wild Against Wild Blue Yonder," *Los Angeles Times*, April 4, 1994.

cilitate the training of F-15 and F-16 crews stationed at Eielson Air Force Base near Fairbanks and Elmendorf Air Force Base near Anchorage, the Air Force is attempting to convert seven Alaska temporary Military Operations Areas (MOAs) into permanent MOAs, modify five permanent MOAs, and create two new MOAs.

The 70,000 square miles of Alaska MOA airspace will be used for supersonic aircraft training operations.¹³ Although most of the land under the airspace appears to be wilderness, it is wilderness on which Alaskan federally recognized Indian tribes depend for their sustenance through subsistence hunting and trapping. Further, Native American villages are located within the boundaries of several MOAs, a fact that has real-life consequences for those who live there.

For example, Stony River, an Indian village at the confluence of the Stony and Kuskokwim Rivers in western Alaska, is located within the boundaries of the Stony MOA. The Indian residents of the "Village of Stony River" have been designated by the Secretary of the Interior as a federally recognized Indian tribe.¹⁴

During the spring of 1993, Air Force aircraft flying training sorties at supersonic speed inside the Stony MOA overflew the village. The trailing sonic boom broke windows, cracked sheetrock, threw canned goods off shelves, and, in one home, knocked a pot of coffee off a stove. Low-flying aircraft have disrupted village subsistence hunting activities.¹⁵

Nevertheless, in contravention of the directive in the President's April 29, 1994 memorandum that it do so, during preparation of the MOA DEIS, the Air Force did not consult representatives of the federally recognized Indian tribe at Stony River or representatives of

¹³See Eleventh Air Force, *Draft Environmental Impact Statement: Alaska Military Operations Areas* (hereinafter "MOA DEIS"), 1994.

¹⁴See Appendix.

¹⁵Personal communication from Stony River resident Andrew Gusty (January 11, 1995). According to Mr. Gusty, the damage inflicted on his home by the maneuvers still had not been repaired by the Air Force more than a year later.

any other federally recognized tribe whose members might be affected by aircraft operating in MOA airspace.¹⁶

Through this dereliction, the Air Force has contributed to the formation of an informal alliance between affected tribal members and environmental organizations whose members oppose aircraft flying at supersonic speeds over wildlife populations that inhabit acreage inside MOA boundaries and over recreationalists conducting wilderness trips. The *Anchorage Daily News* reported two months after the Air Force released a draft of its MOA environmental impact statement for public comment:

The Air Force has given trappers, pilots, hunters, Natives and environmentalists something to agree on: They don't like the military's plan to establish vast permanent fighter-jet training zones across Alaska. Most of the objections come down to a word: Noise. "If you are out on the river trying to locate a moose, and a jet comes in low, that moose is going to head for the heavy brush," said Bill Miller, tribal council president in Dot Lake.¹⁷ [Alaska] is one of the few places left "with wide open space, sparse population and bountiful fish and wildlife," said Cliff Eames of the Alaska Center for the Environment. "That's why Alaskans and visitors come here."¹⁸

The small Indian village of Dot Lake is located southeast of Eielson Air Force Base and below MOA airspace. The Dot Lake tribal council's opposition came about after the Northern Environmental Center, the Fairbanks-based environmental organization that helped coordinate local opposition to the enlargement of MOA airspace, recruited village representatives to participate in a Center-sponsored meeting to coordinate public comment on the MOA DEIS.¹⁹

¹⁶MOA DEIS, Vol. 1, p. 1-4 (no public meeting on the proposed action held at the village of Stony River); Vol. 2, p. 6-5 (no residents of Stony River or officials of the Stony River federally recognized tribe contacted regarding the proposed action).

¹⁷Dot Lake is a small Indian village located on the northern boundary of the proposed Tanana MOA. The Secretary of the Interior has designated the Indians who reside in the Village of Dot Lake as a federally recognized Indian tribe. See Appendix A.

¹⁸Steve Rinehardt, "Jet Zones Hit Headwind," *Anchorage Daily News*, November 20, 1994.

¹⁹Personal communication from Sylvia Ward, executive director of the Northern Environmental Center (January 13, 1995).

We should, however, note that the relationship between the Air Force and Native American groups in Alaska has dramatically improved in the last 18 months. By working in close consultation with the Tanana Chiefs Conference, a non-profit membership corporation organized under the laws of the state of Alaska, the Air Force has been able to identify a range of Native American concerns and make adaptations to its proposed plans. Air Force officials have also made numerous visits to isolated Native villages to identify additional issues. One example is the Air Force's willingness to raise the floor of operations in a proposed MOA in response to concerns by the Athabascan residents of Arctic Village about effects on caribou migration. The consultation process and ensuing modifications constitute an essential part of ensuring political support for DoD land and airspace initiatives.

In summary, the commonalty of interest between federally recognized Indian tribes and environmental organizations regarding DoD use of public land has produced a natural political alliance whose formation can have important consequences for DoD agencies.²⁰ To mitigate adverse consequences before they occur, DoD agencies should ensure that the administrative process through which agency decisions are made is conducted in a reasoned and fair manner that takes the legitimate interests of tribal members into account and attempts to accommodate those interests, by consulting with tribal leaders on a government-to-government basis and by working with tribal leaders to ensure that tribal concerns are given careful attention during all phases of the agency decisionmaking process.

²⁰That said, the commonalty of interest between tribal governments and environmental organizations is not cast in concrete; and when their interests diverge, tribes and environmental organizations readily part political company.

For example, the Mescalero Apache tribe recently signed a memorandum of agreement with 33 utility companies to store 7000 tons of high-level radioactive waste on the tribe's reservation in New Mexico. The agreement is opposed by the State of New Mexico and the New Mexico congressional delegation and is anathema to environmental organizations that previously have worked with tribal governments on issues of common concern.

HISTORICAL CONSIDERATIONS

OVERVIEW

In this chapter, we identify the unusually large number of Native Americans (as a percentage of the Native American population) who have served in the armed services as a policy consideration that obligates DoD agencies to consult with Native American leaders of federally recognized Indian tribes and other Native American organizations regarding DoD agency actions that may affect Native Americans.

We also consider the argument that the U.S. Army's part in the implementation of federal Indian policy during the 18th and 19th centuries imposes a unique historical obligation on DoD agencies to consult with Native American leaders of federally recognized Indian tribes and other Native American organizations. We recognize that, because the army's involvement ended more than a century ago, many DoD policymakers may feel that the army's previous participation in the implementation of federal Indian policy should not be a factor in DoD's present-day obligations to Native Americans. However, DoD policymakers who have come to that conclusion must realize that Native American leaders of federally recognized Indian tribes and other Native American organizations with whom they must deal day-to-day may not accept that view. It is also important to recognize that other, non-DoD aspects of U.S. policy regarding Native Americans are significantly motivated by history.

HISTORY OF NATIVE AMERICAN SERVICE IN THE ARMED FORCES

In 1774, when the Massachusetts Provincial Convention ordered each Bay Colony town to organize a militia to defend the colony against the British, members of the Stockbridge Indian tribe enlisted in their local Minuteman company. When the Revolutionary War began in 1775, Generals Richard Montgomery and Benedict Arnold relied on Indian scouts to guide their troops through the wilderness of northern New England on their ill-fated march to seize the British outpost at Quebec.¹

In the more than two hundred years since, Native Americans have served with consistent distinction in the United States armed services. The stories of Ira Hayes, the Pima Indian marine who helped raise the stars and stripes over Iwo Jima, and of the Navajo Code Talkers who, by speaking their indigenous language, secured United States military communications throughout the Pacific theater during World War II, are well known. There are thousands of other untold stories.

During World War I, 8000 Native Americans served in the American Expeditionary Forces. During World War II, 25,000 Native Americans served, a higher percentage, per capita, than any other ethnic group. Most were volunteers, rather than draftees, and collectively they garnered 71 air medals, 51 silver stars, and 47 bronze stars for valor on the battlefield. Two Native Americans, Lieutenant Ernest Childers, a Creek, and Lieutenant Jack Montgomery, a Cherokee, were awarded the Congressional Medal of Honor.²

During the Vietnam War, more than 42,000 Native Americans served in Southeast Asia (three times the number, per capita, of non-Native

¹Don Higginbotham, *The War of American Independence: Military Attitudes, Policy, and Practice, 1763–1789*, The Macmillan Company, New York, 1971, p. 321.

²Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945–1960*, University of New Mexico Press, Albuquerque, 1986, pp. 4–7.

Americans who served).³ The names of 235 Native American servicemen are listed on the wall of the Vietnam Veterans Memorial.⁴

In recognition of Native Americans' unheralded history of military service, in 1994 Congress enacted the Native American Veterans' Memorial Act, which authorized the erection of a Native American veterans' memorial on the Washington, D.C., Mall.⁵

Today, the Department of Veterans Affairs estimates that there are 189,788 Native American veterans,⁶ a substantial number of whom live on reservations in the western coterminous states, in villages in Alaska, and in Hawaii in communities that are located proximate to public land that is administered by DoD agencies.

For that reason, and independent of the directive in the President's April 29, 1994 memorandum that they do so, DoD agencies have a special obligation to consult with representatives of federally recognized Indian tribes and other Native American organizations whose memberships include Native American veterans in decisions regarding DoD agency actions that affect Native Americans.

THE ARMY'S HISTORICAL ROLE

Implications for Policy Today

For more than two hundred years, Congress has ratified treaties and enacted statutes that afford Native Americans federal programs, rights, and procedural opportunities that are not available to non-Native Americans. Congress' authority to do so is derived from Article I, Section 8, of the United States Constitution, which provides

³Nancy Nichols Jagelka, "Healing the Spirit: Native American Vietnam Veterans and PTSD," *The VVA Veteran*, October 1994, p. 19.

⁴140 Congressional Record H10, 797 (statement of Rep. Thomas), daily edition, October 4, 1994.

⁵Public Law No. 103-384, 108 Stat. 4067 (1994).

⁶National Center for Veteran Analysis and Statistics, *United States Veterans by State and Minority Status*, Washington, D.C.: Department of Veterans Affairs, 1993.

that "The Congress shall have power to regulate commerce with the Indian tribes."⁷ (Emphasis added.)

While Article I, Section 8, empowers Congress to afford Native Americans special treatment, it does not require Congress to do so. Nevertheless, Congress has repeatedly acknowledged "the federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole."⁸ In addition, the United States Supreme Court has repeatedly alluded to Congress' "unique obligation toward the Indians."⁹

While the "unique obligation" has no constitutional underpinning, it has a compelling policy justification. Particularly since 1969 (when the occupation of Alcatraz Island began an era of political activism that has forced the tragic history of Native Americans into the nation's contemporary consciousness), the motivation for Congress' pro-Native American enactments has been the need to atone for Indian policies that Congress pursued throughout the 18th and 19th centuries.

Although the following historical review includes well-known events that occurred more than 100 years ago and would seem to have little bearing on today's military, overall American attitudes and federal policy toward Native Americans are in fact shaped by history to a unique extent. It is difficult to think of other current issues that are driven by century-old history to the extent Native American affairs are. As discussed above, recent media events have further reawakened the historical memory. Thus, it is likely that the Department of Defense will continue to encounter individuals who believe that the historical events described below have implications for policy today.

⁷The President's April 29, 1994 memorandum's references to "tribal governments," rather than to individual Native Americans, are not a happenstance. The memorandum was carefully drafted to reflect the United States Supreme Court's repeated rulings that Acts of Congress that discriminate in favor of Native Americans do so on the constitutionally permissible ground of political status (i.e., that individual Native Americans are "members of quasi-sovereign tribal entities" or are descendants of members of tribal entities), and not on the constitutionally impermissible ground of ethnicity.

⁸Public Law No. 100-472, Title I, Section 102, 102 Stat. 2285 (codified at 25 USC 450a(b)) (1988).

⁹*Morton v. Mancari*, 417 U.S., pp. 535, 555.

DoD personnel should anticipate those reactions and understand how important Native American groups and their sympathizers may view the role of history to be in the current context.

Historical Background

In 1783, the peace treaty that ended the Revolutionary War designated the Mississippi River as the western boundary of the United States. However, notwithstanding the line on the map, in 1783 the new federal government exercised political control only over a narrow strip of ground along the Atlantic seaboard. Between the western boundary of the occupied strip and the east bank of the Mississippi River, tens of millions of acres of wilderness were occupied by Native Americans who were organized into political units called tribes, each of which had an economy and a military capability.

In recognition of that reality, the Continental Congress acknowledged that each tribe held "aboriginal title" to the land its members traditionally used and occupied, and, as a matter of policy, prohibited whites from settling on tribal land until the tribe ceded its aboriginal title to the United States.

To implement that policy, in 1786 Congress assigned the War Department responsibility for managing the federal government's relations with the tribes. However, continued white encroachment on tribal land made the effective discharge of that responsibility impossible. Once Congress assigned the army the task of disciplining Indians for acts committed in retaliation for white trespasses, the troops stationed along the frontier repeatedly were placed in harm's way.

In 1790, for example, General Josiah Harmer lost 183 men when his force was ambushed by Indians north of the Ohio River. The next year General Arthur St. Clair lost 630 men at the same location in the army's most disastrous military defeat to that early date. Three years later General Anthony Wayne lost another 33 men avenging St. Clair at the Battle of Fallen Timbers.

When he assumed office in 1789, President George Washington attempted to bring peace to the frontier by urging Congress to enact

an Indian policy that relied on fair dealing and cultural co-option to persuade Indian leaders to voluntarily cede their tribes' land.

When he assumed the presidency in 1801, Thomas Jefferson continued Washington's policy of negotiation and co-option. But Jefferson also had a realpolitik understanding of the insatiability of white demands for Indian land. "[O]ur settlements will gradually circumscribe and approach the Indians'," the nation's third President predicted in 1803. When they did, the Indians "will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi [River]."¹⁰

Soon after the War of 1812, removal became the U.S. government's unofficial Indian policy, and by 1820 Ohio, Indiana, and Illinois had been cleared of their indigenous occupants. In 1830 removal became the official policy when Congress enacted a statute that delegated President Andrew Jackson authority to relocate Native Americans who lived east of the Mississippi to locations west of the river.

President Jackson's removal of Native Americans from Georgia and the Carolinas, and then from Mississippi and Alabama, solved the "Indian problem" east of the river. But by 1848 white demand for tribal land west of the river had created a new "Indian problem." Congress and the federal executive branch responded by developing a new policy whose objective was to sequester on reservations Indians who lived west of the river.

For the next forty years, the federal executive branch implemented the reservation policy as ruthlessly as Andrew Jackson had implemented the removal policy. In 1886, when the Chiricahua Apache war chief Geronimo surrendered after having led a small band of his people off the reservation to which they had been assigned, the policy's objective—clearing the public domain of Indians so that the American West could be opened to white settlement—was achieved. For the century since then, the nation has had to live with the consequences.

¹⁰Thomas Jefferson to William Henry Harrison (February 27, 1803), reprinted in *Thomas Jefferson: Writings*, Library of America, New York, 1984, p. 1118.

Congress bears the responsibility for crafting the nation's 18th and 19th century Indian policies. But no executive branch agency had a greater hand in the implementation of those policies than the United States Army.

The army's involvement in the military campaigns waged against tribes north of the Ohio River was described above. South of the Ohio River, the army implemented the removal policy in 1836 by forcibly transporting 2495 Creeks from their homes in Alabama to Oklahoma, where, according to the historian Angie Debo, "literally naked, without weapons or cooking utensils, [they] were dumped there to live or die."¹¹ Two years later General Winfield Scott, who is said to have been sickened by the assignment, commanded the 7000 troops that marched the Cherokees from Georgia to Oklahoma on the infamous Trail of Tears. As a private who served under Scott later described the scene: "[T]he helpless Cherokees [were] arrested and dragged from their homes, and driven by bayonet into the stockades. And in the chill of the morning loaded like cattle or sheep into wagons and started toward the west."¹²

Between the end of the Civil War in 1865 and the beginning of the Spanish-American War in 1898, the principal military objective of the nation's downsized standing army was fighting Indians.¹³ In Arizona, the army fought 137 engagements against the Indians between 1866 and 1870. During the summer of 1867, General Winfield Hancock and his subordinate, Lieutenant Colonel George Armstrong Custer, had 1400 men in the field fighting the Cheyenne and the Sioux. In 1873 General Edward Canby, the commander of the Military Department of the Columbia, was killed by the Modoc Indian leader, Captain Jack, during the army's effort to force Jack's band to return to their reservation. Three years later, the Sioux killed

¹¹ Angie Debo, *A History of the Indians of the United States*, University of Oklahoma Press, Norman, 1970, p. 103.

¹² *Ibid.*, pp. 108–109.

¹³ As the historian Robert Utley has described the situation during the years between the Confederacy's defeat and Geronimo's surrender, "Virtually every major war of the two decades after Appomattox was fought to force Indians on to newly created reservations or to make them go back to reservations from which they had fled." Robert M. Utley, *Frontier Regulars: The United States Army and the Indian, 1866–1891*, University of Nebraska Press, Lincoln, 1973, p. 164.

Custer and 264 other members of the Seventh Cavalry at the Little Big Horn River. In 1877 Canby's successor, General O. O. Howard, lost 109 men during the campaign to force the Nez Perce Indians onto a reservation to which they had never agreed to move. And in 1886, when Geronimo and his band of no more than fifty warriors surrendered to General Nelson Miles after having escaped from the reservation to which they had been assigned, the army had 42 companies of cavalry and infantry in the field attempting to achieve that objective.

All told, between 1866 and 1890, the army fought more than 1000 engagements against the Indians. Sixty-nine officers and 879 enlisted men were killed, and 1058 officers and enlisted men were wounded.¹⁴ In 1870 the federal government estimated that, to that date, the United States treasury had been tithed more than \$1,000,000 per dead Indian,¹⁵ and Secretary of War Robert Lincoln subsequently estimated that the campaigns the army waged against Indians between 1872 and 1882 cost \$223,891,264.¹⁶

As noted above, the significance of these events for policy today may lie with the extent to which Native Americans themselves believe they should affect policy. The members of the federally recognized Indian tribes that the President's April 29, 1994 memorandum directs DoD agencies to consult are descendants of the members of the tribes that the army removed by force of arms during the 19th century from what is now DoD agency-administered public land. For that reason, many consider the army's past involvement in the implementation of federal Indian policy to be a central element of the DoD-Native American relationship that in and of itself justifies the President's admonition to DoD agencies to "operate within a government-to-government relationship with federally recognized tribal governments."

¹⁴Utley, *Frontier Regulars* p. 412, note 19.

¹⁵Felix Cohen, *Handbook of Federal Law*, Government Printing Office, Washington, D.C., 1942, p. 28.

¹⁶Howard Lamar (ed.), *The Reader's Encyclopedia of the American West*, Thomas Y. Crowell Company, New York, 1977, p. 561.

TREATIES AND MAJOR STATUTES

OVERVIEW

We next discuss treaties and identify major statutes that impose legal obligations on DoD agencies that are of interest to Native Americans. Unlike the highly prescriptive statutes involving the regulation of industrial effluents, implementation of the identified statutes requires DoD agencies to exercise administrative discretion. Failure to exercise that discretion to implement statutory mandates in the procedural and substantive manner required by law can result in judicial reviews of agency actions that may needlessly compromise the achievement of DoD agency objectives. Implementation of the directives contained in the President's April 29, 1994 memorandum can avoid that consequence by facilitating the reasonable and fair execution of statutory mandates.

TREATIES

Between 1789 and 1871 the President negotiated and the United States Senate ratified hundreds of treaties with Indian tribes. With small exception, the purpose of each treaty was to codify the treating tribe's agreement to cede its aboriginal title to some or all of the land its members used and occupied. More than a hundred years later, most of those treaties remain in force. Pursuant to Article VI of the United States Constitution, they are "the supreme law of the land," whose legal status is coequal with that of Acts of Congress.

Among other provisions, a number of treaties guarantee members of treating tribes the right to hunt and fish and gather on and to otherwise use land their tribe ceded, including public land that DoD agencies today administer for military purposes.

For example, in the 1850s the United States Senate ratified treaties that had been negotiated with tribes whose members reside in what today is the State of Washington. The purpose of the treaties was to secure the tribes' cession of aboriginal title to land surrounding Puget Sound. In exchange for the cessions, the treaties guaranteed tribal members the right to take "fish, at all usual and accustomed grounds and stations [within the ceded territory] . . . in common with all citizens of the Territory [of Washington]." In 1974 the United States District Court in Seattle held that the treaties remain in force and that the above-cited text guarantees tribal members the right to harvest one-half of all fishery resources.¹ Expanding on that holding, in December 1994 a judge of the same court ruled that the same text allows tribal members to gather shellfish on beaches within the ceded territory.² Implementation of the December 1994 ruling has not yet begun. However, beaches within the boundaries of the six installations that the navy operates on Puget Sound are as subject to the treaty right to harvest shellfish as are other beaches within the ceded territory.³

STATUTES

Numerous acts of Congress impose a duty on DoD agencies to administer public land under their control or to take other administrative action in ways that protect the interests of Native Americans. Some statutes impose generic obligations. Others impose obligations that are area-specific to particular DoD agency-administered public land. Whether the obligation is generic or area-specific, the

¹United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

²United States v. State of Washington, No. CV 9213, Subproceeding No. 89-3 (Memorandum and Order, December 20, 1994).

³Personal communication from John Hough, Assistant Attorney General, State of Washington (January 13, 1995). Personal communication from Kevin Lyons, counsel for plaintiff tribes (January 20, 1995).

President's memorandum requires DoD agencies to consult with representatives of federally recognized Indian tribes prior to implementing each statute.

While not exhaustive, the following list is representative of major statutes:

Administrative Procedure Act

With certain exceptions (the most important of which is "military authority exercised in the field during time of war or in occupied territory"), Congress requires DoD agency decisions to be made in a manner that is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴ While Congress has not defined its terms, the United States Supreme Court has held that an agency decision is per se "arbitrary, capricious and an abuse of discretion" if the decision was made without "consideration of the relevant factors."⁵

Under this assumption, if a "reasonable person" concludes that implementation of a DoD agency decision will affect Native Americans (regardless of whether they are members of a federally recognized Indian tribe), the agency has a statutory obligation to take that effect into account prior to making the decision. If it does not, the decision is per se "unlawful" and Congress has delegated to the judiciary authority to "set [the decision] aside."

For that reason, considering the effect that DoD agency decisions may have on members of federally recognized Indian tribes is good administrative practice. However, it is difficult for a DoD agency decisionmaker to know what the effect of a particular decision may be on members of a tribe without asking. The President's memorandum acknowledges this common-sense conclusion by instructing DoD agency decisionmakers to "consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments."

⁴5 USC 706(2).

⁵Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

Although the memorandum does not define the term “consult,” it is reasonable to assume that the President intended the term to have its dictionary meaning. And this meaning imposes a duty on DoD agencies to do more than simply notify a tribal government of a pending decision. Rather, the obligation to “consult” requires DoD agencies “to seek advice or information from” the affected tribe, to “ask guidance from” the tribe, and “to have regard for ([the members of the tribe’s] interest, convenience, etc.) in making plans.”⁶

National Environmental Policy Act

Concerned that federal agencies were not adequately considering relevant environmental factors prior to making decisions, in 1969 Congress enacted the National Environmental Policy Act (NEPA).⁷

Section 102 of the Act requires DoD agencies to assess the “environmental impact” of proposed “major federal actions” that, if taken, may “significantly affect” the quality of the “human environment.” Council on Environmental Quality regulations interpreting the intent of Congress embodied in Section 102 state that the phrase “human environment” includes not only the “natural and physical environment,” but also “the relationship of people with that environment.”⁸ The regulations also indicate that Congress intended DoD agencies to consider the “historic, cultural, economic, social,” and “health” consequences of their proposed actions.⁹

As a consequence, and independent of the obligations that the Administrative Procedure Act and the President’s April 29, 1994 memorandum impose, NEPA requires DoD agencies to consider the effect of their decisions on the culture, economy, society, and health of affected Native Americans, regardless of whether such Native Americans are members of a federally recognized Indian tribe.

⁶*Webster’s Encyclopedic Unabridged Dictionary of the English Language*, Gramercy Books, New York, p. 315.

⁷Public Law No. 91-190, Title I, 83 Stat. 852 (codified at 42 USC 4331-35) (1970).

⁸40 CFR 1508.14.

⁹40 CFR 1508.8.

Revised Statute 2477

Between its enactment in 1866 and its repeal in 1976, Revised Statute 2477¹⁰ granted “right[s] of way for construction of highways over public lands, not reserved for public uses.” All RS 2477 rights-of-way created by public use prior to 1976 remain in effect.

A RS 2477 right-of-way was established automatically when public use established a “highway.” The definition of the term “highway” was controlled by the law of the state within which a particular route across a tract of public land was located. And whether public use of a particular route was substantial enough to have established a RS 2477 “highway” is a question of fact.

If a RS 2477 highway was established on a tract of public land prior to the tract’s withdrawal for use by a DoD agency for military purposes, the agency’s use of the tract is subject to the RS 2477 right-of-way.¹¹ For that reason, RS 2477 has important implications for DoD agencies that administer large tracts of public land. As the United States Court of Appeals for the Ninth Circuit (whose jurisdiction encompasses the western states) recently noted with respect to an RS 2477 right-of-way that runs across a DoD installation in Alaska, as long as it has “definite termini” and depending on the law of the state in which it is located, “the barest foot trail may qualify for RS 2477 status.”¹²

Throughout the western states, Native Americans were a major segment of the public traveling across public lands subsequent to 1866, so there undoubtedly are RS 2477 rights-of-way of significance to Native Americans. The DoD agency responsible for administering the tract of public land within which the right-of-way is located may not be aware of this fact. There also may be RS 2477 rights-of-way the agency is aware of but has unlawfully closed to facilitate the use

¹⁰Codified as 43 USC 932 prior to its repeal.

¹¹*Ibid.*

¹²*Shultz v. Department of the Army*, 10 F.3d 649 (9th Cir. 1993). After the case was decided by a three-judge panel of the circuit court, the Department of the Army requested the entire court, sitting en banc, to reconsider the panel’s decision. The court agreed to do so, the en banc reconsideration has been briefed and argued, and the parties are awaiting a decision.

of the land for a military purpose. The President's April 29, 1994 memorandum thus requires DoD agencies to consult with federally recognized Indian tribes to ensure that the agencies' management of public land that has been withdrawn for military purposes accommodates tribal members' use of RS 2477 rights-of-way.

Archaeological Resources Protection Act

The Archaeological Resources Protection Act (ARPA)¹³ prohibits the excavation or removal of "archaeological resources" discovered on public land administered by a DoD agency, except by a permit issued by the agency pursuant to ARPA.

ARPA defines the term "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest" and which are at least 100 years old.

Since Native Americans were the humans who made the first and most extensive early use of what is now public land, significant archaeological resources found on DoD agency-administered public land are of Native American origin. For that reason, before issuing a permit that authorizes an excavation or removal that may "result in harm to, or destruction of, any [archaeological resources that are a Native American] religious or cultural site," ARPA requires the DoD agency to notify "any tribe¹⁴ which may consider the site as having religious or cultural importance."

In addition to imposing the duty to notify affected tribes, in 1988 Congress amended ARPA to require DoD agencies to develop a plan for a survey of public land that they administer to determine the nature and extent of the archaeological resources located thereon, and to prepare a schedule for a survey of the land most "likely to contain the most scientifically valuable archaeological resources."¹⁵ The preparation of survey plans and schedules is an important DoD

¹³Public Law No. 96-95, 93 Stat. 721 (codified as amended at 16 USC 470aa et seq.) (1979).

¹⁴In addition to federally recognized Indian tribes, ARPA defines the term "Indian tribe" to include "Alaska Native village or regional or village [sic] corporation[s]."

¹⁵16 USC 470mm.

agency action that requires, by the President's corrective, consultation with affected federally recognized Indian tribes.¹⁶

National Historic Preservation Act

The National Historic Preservation Act (NHPA)¹⁷ requires the Secretary of the Interior to maintain a national register of historic places that may include "districts" and "sites" that are significant in "American history archaeology and culture." NHPA also imposes duties on DoD agencies. Before approving an expenditure for, or the licensing of, an undertaking that may affect a "district or site that is included in or eligible for inclusion in the national register," the DoD agency involved must "take into account the effect of the undertaking" on the district or site. As a component of doing so, the agency also must afford the Advisory Council on Historic Preservation an opportunity to comment on the undertaking.¹⁸

Recognizing that an historic district or site may be of Native American origin, if a proposed undertaking on DoD agency-administered public land might affect a district or site that is "of historic value to an Indian tribe,"¹⁹ the Advisory Council's regu-

¹⁶To facilitate compliance with ARPA, in 1990 Congress established the Legacy Resource Management Program (LRMP) and appropriated \$10 million for LRMP demonstration projects. (Public Law No. 101-511, Section 8120, 104 Stat. 1905, 1990). The purposes of LRMP include the development of plans "for identifying and managing all significant . . . cultural and historical resources existing on, or involving, all Department of Defense lands," and the creation of "programs to protect, inventory and conserve the artifacts of Native American civilization. . . ." To date, LRMP monies have been used to fund the collection of Native American artifacts at Camp Pendleton in California, to assess the Nohili archaeological site in Hawaii, to develop an archaeological site prediction model at the Naval Air Station at Fallon, Nevada, and for similar projects. (See Office of the Deputy Under Secretary of Defense (Environmental Security), *Legacy Resource Management Program: FY 1991-1993 Report to Congress*, Washington, D.C.: Department of Defense, 1994.)

¹⁷Public Law No. 89-665, 80 Stat. 915 (codified as amended at 16 USC 470 et. seq.) (1966).

¹⁸16 USC 470f.

¹⁹36 CFR 800.2(g) defines "Indian tribe" as the governing body of a group of Native Americans "that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status for that entity or its members. The term also includes any Native village corporation, regional corporation, and Native group established pursuant to the Alaska Native Claims Settlement Act."

lations require the affected tribe to be afforded an opportunity to participate in the Council's consultation with the agency regarding the undertaking.²⁰ The President's memorandum reaffirms the Council's recognition of the importance of consultation with Indian tribes regarding the historic districts and sites on DoD agency-administered public land that is of importance to tribal members.

Native American Graves Protection and Repatriation Act

Public land, and particularly public land located in the western coterminous states and Alaska, contains numerous Native American grave sites. In recognition of that fact, the Native American Graves Protection and Repatriation Act (NAGPRA)²¹ grants ownership of "Native American human remains and associated funerary objects" to the lineal descendants of the decedents. If the lineal descendants cannot be identified, NAGPRA vests title to the remains and associated funerary objects in the "Indian tribe or Native Hawaiian organization" that has "the closest cultural affiliation with" the remains and objects. NAGPRA also grants the tribe or Native Hawaiian organization title to all "unassociated funerary objects" with which it has the closest cultural affiliation.

To implement those arrangements on public land, NAGPRA requires persons who discover Native American remains and funerary objects to notify the agency that exercises "primary management authority" over the land, as well as the appropriate Indian tribe or Native Hawaiian organization. If the discovery was made while engaged in a construction project or other activity, work on the project or participation in the activity must cease and may not be resumed until 30 days after the agency to whom notice was given certifies that it has received the notice. Nor may remains be removed until "after consultation with" the appropriate tribe or Native Hawaiian organization.

When a Native American grave site is discovered on DoD agency-administered public land, compliance with NAGPRA requires the agency to determine the identity of the Indian tribe or Native

²⁰36 CFR 800.1(c)(2)(iii).

²¹Public Law No. 101-601, 104 Stat. 3048 (codified at 25 USC 3001-13) (1990).

Hawaiian organization that has the “the closest cultural affiliation with” the discovered remains and objects. If the identity of the tribe or organization is not apparent, the consultation mandated by the President can facilitate NAGPRA compliance by affording the DoD agency an opportunity to develop a procedure for making the required determination.

American Indian Religious Freedom Act

The American Indian Religious Freedom Act (AIRFA)²² announces that it is the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

AIRFA “requires [DoD and other] federal agencies to learn about, and to avoid unnecessary interference with, traditional Indian religious practices.” It also requires agencies to “evaluate their policies and procedures in light of [AIRFA’s] purpose” and to “consult Indian leaders before approving a project [that is] likely to affect religious practices.” However, unlike other statutes that Congress has enacted to benefit Native Americans, AIRFA does not impose duties on DoD and other federal agencies that aggrieved Native Americans may request the judiciary to enforce.²³ Rather, “AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values” and “it does not prohibit agencies from adopting all land uses that conflict with traditional Indian religions, beliefs and practices.”

²²Public Law No. 95-341, 92 Stat. 469 (codified in part at 42 USC 1996) (1978).

²³*Wilson v. Block*, 708 F.2d 735, 746–47 (D.C. Cir. 1983). See also *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, p. 455, 1988 (holding that “nowhere in [AIRFA] is there so much as a hint of any intent [of the Congress] to create a cause of action or any judicially enforceable individual rights”).

**NATIVE AMERICAN GROUPS OTHER THAN
FEDERALLY RECOGNIZED TRIBES**

OVERVIEW

In this chapter we review one of DoD's most significant challenges in developing and implementing an effective approach to Native American concerns—the potential need to consult with groups that are “federally recognized tribes.” Clearly, the threshold challenge for each commander and land manager will be to determine whether a particular Native American organization is a federally recognized Indian tribe, and, if it is not, whether a federal statute or a policy consideration nevertheless makes consultation with the organization appropriate. There may be other situations where it is in DoD's interest to consult with Native American organizations that are not federally recognized tribes. This situation can be expected to arise with particular frequency in Alaska and Hawaii, states in which Native Americans' history of involvement with the federal government is different in a number of determinative respects from that of Native Americans who reside in the coterminous states.

FEDERAL RECOGNITION

When asked by the 1990 census enumerators, 1.9 million citizens (of various blood quantum) identified themselves as “Native American.” But the President's April 29, 1994 memorandum does not direct DoD agencies to consult with or to consider the effects of their plans, projects, programs, and activities on individual Native Americans. Rather, the memorandum directs DoD agencies to consult with, and to consider the effects of agency actions on, “federally recognized

tribal governments” and to operate with such governments “within a government-to-government relationship.”

Thus, the threshold query must be: Is a particular group of Native Americans a “federally recognized Indian tribe?”

“Federal recognition” is a legal concept whose convoluted history is beyond the scope of this report. Felix Cohen, who during his lifetime was the nation’s preeminent Indian law scholar, long ago noted that “the term ‘tribe’ is commonly used in two senses, an ethnological sense and a political sense.”¹ A group of Native Americans may be a “tribe” in an ethnological sense but not in a political sense. As William Quinn, a knowledgeable contemporary scholar has explained the distinction:

[I]n terms of tribal existence, the distinction must always be kept foremost in mind between “legal or political” existence and “ethnic” existence. Because an Indian community is not recognized by the United States does not necessarily mean that it is not a tribe in an ethnic, autonomous, or other sense.”²

Conversely, there may be tribes that are federally recognized that have only limited rationales for claiming to be a tribe in either a political or an ethnic sense.

In 1901 the United States Supreme Court defined an ethnological “tribe” as a “body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”³

However, a group of Native Americans that satisfies the ethnological test is not necessarily a “federally recognized tribe.” Article 1, Section 8, of the United States Constitution empowers Congress to decide which groups of Native Americans (including ethnological tribes) are “tribes” with whom Article 1, Section 8, empowers it to

¹Cohen, p. 268.

²William W. Quinn, “Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept,” *American Journal of Legal History*, Vol. 34, October 1990, p. 336.

³*Montoya v. United States*, 180 U.S. 261, 266 (1901).

deal. As the United States Supreme Court has explained the concept: "[T]he questions whether, to what extent, and for what time [distinct Indian communities] shall be recognized . . . as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress. . . ."⁴

Between 1789 and 1871 the United States Senate conferred federal recognition by ratifying 372 treaties that the President negotiated with various groups of Native Americans. For policy reasons, in 1871 Congress ordered the President to stop negotiating treaties, and subsequent to that date Congress has conferred tribal recognition through its enactment of statutes that benefit particular Native American groups. However, Congress complicated that relatively straightforward system by also enacting statutes that confer benefits on "Indian tribes" without specifying whether it intended that phrase to pertain to groups of Native Americans that it previously had recognized as tribes or to also pertain to groups of Native Americans who were members of unrecognized ethnological tribes.

In 1934, Congress enacted the Indian Reorganization Act (IRA),⁵ which authorized Native Americans to organize tribal governments and the Secretary of the Interior to approve the governments' constitutions.

Under the IRA, when a group of Native Americans presented a constitution for the Secretary's approval, he then had to decide whether the group was a "tribe" authorized to organize a government. The Secretary reasoned that Congress had delegated him this authority.⁶ The Solicitor of the Department of the Interior developed five criteria that the Secretary applied informally and inconsistently to make that determination.⁷ The Secretary did so even though, as the American Indian Policy Review Commission later informed Congress: "There [was] no congressionally sanctioned procedure for the Interior Department to adopt in recognizing tribes," nor had Congress ever

⁴United States v. Sandoval, 231 U.S. 28, 46 (1913).

⁵Public Law No. 73-383, 48 Stat. 984 (codified as 25 USC 461 et seq.) (1934).

⁶Cohen, pp. 270-271.

⁷Ibid. See also American Indian Policy Review Commission, *Final Report*, Government Printing Office, Washington, D.C., 1977, pp. 461-480.

enacted a “statement of policy urging the Interior Department to establish such a procedure.”⁸

Because Native Americans are not eligible to receive Bureau of Indian Affairs and Indian Health Service benefits unless they are members of a federally recognized tribe, in 1977 the Commission urged Congress to enact a concurrent resolution “affirming its intention to recognize all Indian tribes as eligible for the benefits and protections of general Indian legislation and Indian policy; and directing the executive branch to serve all Indian tribes.”⁹

But Congress declined the invitation and, as a consequence, in 1978 the Secretary of the Interior unilaterally promulgated regulations—found in 25 CFR 83.1 et seq.—that establish a procedure to enable a group of Native Americans to apply to the Secretary for “federal recognition” that its members are a tribe. Section 83.5 of those regulations requires the Secretary to periodically publish a list of all Native American groups that have been “federally recognized” as “Indian tribes.” The current list, published in 1993, identifies 547 “federally recognized tribes”;¹⁰ it appears here as Appendix A.

In 1994 Congress enacted the Federally Recognized Indian Tribe List Act (FRITLA),¹¹ which, post hoc and albeit implicitly, delegates the Secretary of the Interior authority to promulgate his recognition regulations. FRITLA affirms that Indian tribes may be recognized “by the administrative procedures set forth in part 83 of the Code of Federal Regulations,” and requires the Secretary to annually publish the list described above.

Congress’ ratification of the Secretary of the Interior’s list facilitates DoD agency compliance with the President’s April 29, 1994 memorandum, since identification of a particular Native American group requesting to be consulted on a “government-to-government basis” as a “federally recognized Indian tribe” can be ascertained by consulting the list.

⁸American Indian Policy Review Commission, p. 476.

⁹*Ibid.*, p. 480.

¹⁰58 Fed. Reg. 54, pp. 366–369, October 21, 1993.

¹¹Public Law No. 103-454, 108 Stat. 4791 (1994).

That said, there are 150 Native American groups that have not been federally recognized as Indian tribes, although each has petitioned the Secretary of the Interior for recognition.¹² Also, implementation of statutes such as the Native American Graves Protection and Repatriation Act requires DoD agencies to consult Native Hawaiian organizations and other Native American groups that have not been federally recognized. For those reasons, DoD agency personnel should be knowledgeable regarding any Native American history on public land located within the boundaries of their installations, not just that of federally recognized Indian tribes.

ALASKA NATIVES

A number of military facilities in Alaska and the current effort to expand MOA airspace, Alaska is an important state for DoD. For that reason, DoD personnel in Alaska should be aware of the unique history of Alaska Natives' involvement with the federal government and the particular circumstances surrounding a Native group's claims or interests.

The Secretary of the Interior has recognized Alaska Natives as members of "federally recognized Indian tribes," which DoD agencies are directed to consult and work with. DoD agencies would be well advised to consider consultation with other Alaska Native organizations as well.

More than 85,000 Indians, Aleuts, and Eskimos (collectively known as "Alaska Natives") live in Alaska, approximately 25,000 of whom reside in Anchorage and Fairbanks or one of the other large towns. Most of the other 60,000 reside in one of more than 200 small Native villages.

Throughout the 19th century, Congress pursued an Indian policy in Alaska that was quite different from the Indian policies it pursued in the 48 coterminous states. One of the consequences of its Alaska Native policy was that Congress did not recognize Native residents of Native villages as "federally recognized tribes," although Natives

¹²140 Congressional Record H 10,482 (remarks of Rep. Richardson), daily edition, October 3, 1994.

have received services since 1885 that now are provided by the Bureau of Indian Affairs and the Indian Health Service.

In 1979, when the Secretary of the Interior published his first list of federally recognized tribes, the list did not include any Native villages or groups. The omission engendered protests from leaders of the governing bodies of a number of Native villages, which the Secretary tried to quiet by including a separate list of Native villages in the list of federally recognized tribes that he published in 1982. But the title of, and the preamble explaining, the Native village list made it clear that the Secretary did not consider Alaska Natives who lived in Native villages to be members of "federally recognized tribes," and that the appearance of Native villages on the 1982 list was not intended to confer federal recognition.

Subsequent to publication of the 1982 list, Native protests intensified. As a consequence, without requiring any village to comply with the recognition process set out in the Secretary's regulations, in January 1993 the Solicitor of the Department of the Interior concluded that since the enactment of the Indian Reorganization Act in 1934 "Congress and the Department [of the Interior] have dealt with Alaska Natives as though there were tribes in Alaska."¹³ And in October 1993, when he updated his list of federally recognized tribes, the Secretary made it clear in the preamble that the 223 Native villages¹⁴ and two Native regional organizations¹⁵ on the list "have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States."¹⁶

¹³Opinion No. M-36,975 of the Solicitor of the Department of the Interior, January 11, 1993.

¹⁴In addition to Alaska Natives, the list includes the Metlakatla Indian Community, whose members are Tsimshian Indians whose ancestors immigrated to Alaska from British Columbia in 1887, and who today reside on Annette Island on the southern tip of the southeast Alaska panhandle.

¹⁵The two Native regional "tribes" are the Kenaitze Indian tribe, whose membership is composed of Indians who reside in the vicinity of the city of Kenai on the Kenai Peninsula, and the Inupiat Community of the Arctic Slope, whose membership is composed of Inupiat Eskimos who reside in villages on Alaska's North Slope.

¹⁶58 Federal Register 54,366, October 21, 1993.

As a consequence, the Alaska Native villages and organizations listed on the Secretary of the Interior's October 1993 list are federally recognized Indian tribes that the President's memorandum requires DoD agencies to consult and with which the memorandum requires them to "operate within a government-to-government relationship."

In addition, there are other Alaska Native groups that various Acts of Congress require DoD agencies to treat as federally recognized tribes for specific purposes, and with which DoD agencies should consult as a matter of policy. As illustrated by the earlier discussion on Alaska airspace, the Tanana Chiefs Conference is one such group. The history of Native affairs in Alaska indicates that additional groups that are not federally recognized tribes may also be important.

Although the United States has owned Alaska since 1867, Congress did not extinguish Alaska Native aboriginal title to the 375 million acres of land within its borders until 1971, when it enacted the Alaska Native Claims Settlement Act (ANCSA).¹⁷ The Act authorized Alaska Natives to be conveyed fee title to 44 million acres of the land to which they had held aboriginal title, and to be paid \$962.5 million as compensation for the 331 million acres on which their aboriginal title was extinguished.

To file their land claims, in the mid-1960s Alaska Natives organized 12 regional nonprofit associations, and in 1967 they organized a statewide organization—the Alaska Federation of Natives—to lobby Congress to enact claims settlement legislation.

When Congress enacted ANCSA in 1971, it authorized Natives living in each village to organize a village business corporation and Natives in each geographic region that had been represented by a Native regional nonprofit association to organize a regional business corporation. Legal title to most of the 44 million acres of land was then conveyed, and the \$962.5 million was paid to the village and regional corporations rather than to individual Natives or to the governing bodies of the organizations that subsequently have been recognized as Alaska Native tribes.

¹⁷Public Law No. 92-203, 85 Stat. 688 (1971).

Today, the Alaska Federation of Natives continues to represent Alaska Natives regarding most statewide Native issues. A second statewide Native group, the Alaska Inter-Tribal Council, represents federally recognized tribal governments on statewide tribal issues. The twelve Native regional nonprofit organizations continue to represent the interests of Alaska Natives who reside in villages located within their geographical boundaries. And the twelve Native regional and more than two hundred Native village corporations continue to own most of the 44 million acres of land that Natives received as compensation for the extinguishment of their aboriginal title.

The agglomeration of Native organizations presents significant challenges for DoD agencies operating in Alaska. For example, the Air Force is attempting to enlarge its Alaska MOA airspace. The Air Force must consult the governing bodies of the federally recognized tribes about its proposed action, and—as a matter of political prudence and good administrative practice—it should also consult the four Native regional nonprofit associations within whose boundaries the MOAs are located, as well as the four Native regional business corporations that own land that Air Force jets will overfly, and the numerous village business corporations that also own land.

NATIVE HAWAIIANS

Like Alaska, Hawaii is both a center of DoD agency activity and a state with a unique set of Native American concerns. Native Hawaiians are as indigenous a people as the Alaska Natives or Native Americans who live on reservations in the coterminous states. However, neither Congress nor the Secretary of the Interior has recognized any group of Native Hawaiians as a federally recognized Indian tribe.¹⁸ For that reason, no Native Hawaiian leaders were invited to meet with the President, and the President's April 29, 1994 memorandum does not require DoD agencies to "operate [with Native Hawaiian organizations] within a government-to-government relationship." However, although the memorandum does not require DoD agencies to consult with Native Hawaiian organizations

¹⁸Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985)(Hou Hawaiians, a group of Native Hawaiians organized in 1974 that characterized itself a "Native Hawaiian tribe," was held not to be a "federally recognized Indian tribe").

regarding plans, projects, programs, and activities that may affect their members, important policy reasons justify their doing so.

In 1810 Kamehameha I unified the Hawaiian people under his political leadership and established a monarchy that the United States recognized in 1842 as the lawful government of the nation of Hawaii. However, even by that early date the United States was deep in diplomatic intrigue that intensified over the succeeding decades, as the United States, Britain, and France maneuvered to assert political control over the islands. In 1893, John L. Stevens, the United States minister to Hawaii, and a cabal of American businessmen overthrew the Hawaiian government. The conspirators were aided by a company of United States Marines, two companies of sailors, and a Gatling gun that were sent ashore from the U.S.S. *Boston*. Although President Grover Cleveland subsequently characterized the United States military's unwanted (by the Hawaiian government) involvement as an "act of war" that was the "controlling factor" that allowed the coup to succeed, in 1898 the United States annexed Hawaii.¹⁹

In 1993 Congress apologized "to Native Hawaiians on behalf of the people of the United States for the overthrow of the kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination."²⁰ But the atonement did not recognize the contemporary political sovereignty of Native Hawaiians. And the Secretary of the Interior's tribal recognition regulations pointedly preclude Native American groups whose members are not "indigenous to the *continental* United States"²¹ (emphasis added) from applying for recognition as a federally recognized Indian tribe.

While there are no "federally recognized Indian tribes" in Hawaii, 18.8 percent (205,000) of Hawaii's 1.08 million residents claim a

¹⁹See Native Hawaiians Study Commission, *Report on the Culture, Needs, and Concerns of Native Hawaiians*, U.S. Department of the Interior, Washington, D.C., 1983, Vol. I, pp. 147-167, 265-308; Vol. II, pp. 54-79.

²⁰S. J. Res. 19, 103d Cong., 1st Sess. (1993).

²¹25 CFR 83.3(a) (1994).

Native Hawaiian ancestor, and of that number 81,000 residents are one-half or more Native Hawaiian.²²

In recent years, Native Hawaiians have demanded that Congress afford them the same legal status as members of federally recognized Indian tribes. In 1991 Native Hawaiians organized Hui Na'auao, a statewide organization whose purpose is to educate Native Hawaiians about Native Hawaiian sovereignty.

Although it has to date refused to recognize Native Hawaiians as a federally recognized Indian tribe, Congress has responded to the demands of Native Hawaiians by including them by name in statutes that it has enacted to benefit Native Americans, such as the American Indian Religious Freedom Act²³ and the Native American Veterans' Memorial Establishment Act.²⁴ In addition, it has defined the term "Native American" in statutes such as the Native American Graves Protection and Repatriation Act to include Native Hawaiians.²⁵

CASE STUDY: NONRECOGNIZED TRIBE AT CAMP PENDLETON

Some of the problems that DoD installation commanders and land managers can expect to face if they do not have an established and well-understood Native American policy at their installations are illustrated by recent events that have occurred at Camp Pendleton, California.

In the early 1980s, a Native American grave site was discovered inside Camp Pendleton on an eroded strip of land that previously had been leased to the State of California. Upon investigation, the California

²²Office of Hawaiian Affairs, *Native Hawaiian Data Book*, Honolulu, HI, 1994, Tables 1.4 and 1.8.

²³This act establishes national policy to protect the exercise of "the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians. . . ."

²⁴Congress found that "Native Americans across the Nation—Indians, Native Alaskans, and Native Hawaiians—have a long, proud and distinguished tradition of service in the Armed Forces of the United States."

²⁵The term "Native American" is defined to include all individuals who are "indigenous to the United States" (rather than just the 48 coterminous states and Alaska).

Native American Heritage Commission²⁶ advised the Camp Pendleton natural resource officer that the remains likely were those of Native Americans who had been members of the Juaneno Band of Mission Indians. The natural resource officer then consulted with leaders of the Juaneno Band²⁷ and subsequently entered into an agreement with the Band regarding the reburial of the remains on an adjacent tract of land.

Because the new burial site was located on land that had been leased to the State of California, Camp Pendleton quickly lost its institutional memory of the agreement into which the installation's natural resource officer had entered with the Juaneno Band. As a consequence, the Band's use of the burial site was not monitored, and within a few years Band members regularly were using the site for a variety of purposes that Camp Pendleton came to believe were not authorized in the original negotiation. A Marine official suggested that Juaneno Band members occasionally resided on the site, and may even have generated revenue by selling grave sites to Southern California contractors who had discovered other Juaneno remains during excavations on job sites in nearby Orange County.

In 1991, the State of California's lease expired and control of the site reverted to Camp Pendleton. Base personnel did not become aware of the prior agreement with the Juaneno Band regarding Band members' use of the site until an argument between two factions inside the Band caused one faction to assert its rights under the agreement.

²⁶The California Legislature established the Native American Heritage Commission in 1976. See *West's Ann. Cal. Pub. Res. Code*, Section 5097.91 et seq. The Commission's duties include identifying "places of special religious or social significance to Native Americans" and mediating disputes "relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials."

²⁷Because of the unique history of the California Indians' relocation around the Spanish missions prior to the United States' acquisition of California in 1848, the Secretary of the Interior has not recognized the Juaneno Band, whose members are descendants of mission Indians, as a "federally recognized Indian tribe." However, the California statute that establishes the Native American Heritage Commission does not define the term "California Native American tribes." And in their dealings with Native American organizations, the State of California and the Commission do not limit their dealings to organizations that the Secretary of the Interior has recognized as federally recognized Indian tribes.

When trained base personnel then visited the site, they discovered that the condition of coastal scrub was significantly degraded. This can be a critical factor for Camp Pendleton because the scrub is habitat for endangered species that are closely monitored and regulated at Camp Pendleton by the U.S. Fish and Wildlife Service.

Anxious to be rid of a problem that institutional inattention and the lack of a clear policy for dealing with Native American groups had created, base personnel in response denied the Juaneno Band access to the site. The Band reacted by persuading a local congressman to intercede with the installation commander to negotiate a compromise.

Although the Camp Pendleton/Juaneno Band of Mission Indians scenario has evolved as it has for reasons idiosyncratic to the particular situation, the experience illustrates the types of problems DoD installation commanders and land managers can face in their dealings with Native American organizations whose members reside close by.

DoD installation natural resource officers are responsible principally for installation compliance with environmental statutes, and thus usually have no specialized training regarding prior Native American use of public land located inside the installation or regarding the history of local Native Americans who reside nearby. Nor do most installation natural resource offices have the capability to maintain a comprehensive view of land use inside their installation. For the latter reason, it is possible for an installation to "forget" agreements that installation personnel who are not in command authority negotiate with a federally recognized Indian tribe or other local Native American organization, as occurred at Camp Pendleton.

Finally, the Camp Pendleton case study illustrates the willingness of interested members of Congress to involve themselves with issues that affect Native American constituents, even if the affected Native Americans are not members of a federally recognized Indian tribe.

CONCLUSIONS AND RECOMMENDATIONS

We have argued that the importance of Native American affairs to the Department of Defense is growing. Just as environmental affairs became a major DoD concern in the late 1980s, diverse factors indicate the need to pay increased attention to Native American affairs in the next decade. Although the issue is unlikely to be as pervasive and financially costly as that of environmental protection, the Department of Defense will need to develop skills, policies, and procedures to manage issues as they emerge. DoD should interpret the President's meeting on the White House lawn as symbolic of growing awareness.

Specifically, we argue that the questions posed in the introduction to this report should be viewed in the following way.

1. Does the President's April 29, 1994 memorandum reflect a change in Congress or the federal executive branch's political relationship with Native Americans and federally recognized Indian tribes? If so, the DoD agencies should be aware of it.

The President's directive reflects the growing ability of Native American groups to access the political process and ensure that their interests are represented in legislation. Although there seems to be no congressional interest to finance a broad-based assault on the problems of Indian life in America, this increased political influence can result in legislation that has significant implications for DoD facilities.

2. Other than the President's directive that it do so, what reasons does DoD have to implement the President's April 29, 1994 memorandum?

The President's directive provides an overarching strategy for addressing diverse and sometimes unpredictable issues that can affect DoD interests and goals. These diverse issues include the potential for Native American claims to affect DoD land use goals (particularly when the moral strength of these claims are combined with the organizational capability of environmental groups and other well-organized users of the public lands), the potential for some to assert that the Army's historical role implies special obligations for the DoD, and the need to fulfill a variety of statutes related to Native American affairs.

3. What is the nature of the statutes that require DoD agencies to preserve Native American cultural resources and to involve Native Americans generally—and representatives of federally recognized Indian tribes particularly—in DoD agency decisionmaking?

A number of statutes obligate DoD to protect Native American artifacts, religious sites, and historic monuments. As with natural resource laws, these laws are far less prescriptive than environmental laws and require a degree of planning and self enforcement. This implies that they may receive a low priority in DoD's natural and cultural resource program. However, growing political effectiveness suggests that there may be increased use of these laws by Native Americans and allied advocacy groups when seeking to modify federal agency activity. The President's directive provides a general approach to addressing the combined legal, political, and historical aspects of Native American affairs.

4. How should the DoD agencies interact with Native American groups that are not federally recognized tribes?

Although federal recognition is the first test for determining whether consultation is required, there are many unrecognized tribes with which consultation would be in DoD's self-interest. Many statutes already contain obligations to tribes beyond those that are federally recognized. DoD will need to develop tools that help lead to a better understanding of which nonrecognized tribes

have legitimate claims and which do not. DoD must be particularly sensitive to these issues in Alaska and Hawaii.

To respond to these general observations, we recommend that the following actions be taken to implement the President's April 29, 1994 memorandum and to improve DoD's working relationship with Native Americans:

- DoD and the services should develop a written policy to guide DoD installation commanders' and land managers' implementation of the President's April 29, 1994 memorandum. In particular, the policy should instruct DoD installation commanders and land managers to inform the leaders of local federally recognized Indian tribes of their commitment to work with such tribes on a "government-to-government" basis.¹ The policy should recognize that some non-federally recognized tribes should receive the same commitment.
- To begin developing capabilities for determining which nonrecognized tribes have valid claims, histories and maps of prior Native American use of DoD agency-administered land should be made available. Such maps and histories should also be useful in preparing for consultations with recognized tribes and in implementing relevant statutes.
- DoD installations should designate a coordinator for Native American affairs to help retain institutional memory and policy expertise. Currently, installations typically rely on the staff archaeologist, who may not probe into the policy aspects of Native American affairs.
- DoD should communicate its intention to develop and implement the policies described in the first two bullets above in a

¹For example, when Governor Mike Lowry recently asked tribal leaders to negotiate with the State of Washington regarding implementation of their treaty rights to gather shellfish on beaches within their ceded territories, he began each letter: "Dear Tribal Government Leader: We want to communicate with you on a *government-to-government basis* regarding the recent federal decision interpreting the scope of the tribes' treaty rights to harvest shellfish." (Emphasis added.) (Governor Mike Lowry to Tribal Government Leaders, January 12, 1995.) As a matter of DoD policy, installation commanders and land managers should communicate with Native American leaders in the same fashion.

highly visible and politically symbolic manner. In 1944, leaders of thirty federally recognized Indian tribes organized the National Congress of American Indians (NCAI). Today, NCAI is recognized by Native Americans as the spokesorganization for all of the nation's federally recognized tribes. NCAI holds an annual national convention. At the 1994 convention, Vice President Gore delivered the keynote address, during which he reaffirmed the President's commitment "to working diligently and respectfully to help American Indians control their destiny, and to preserve the land of their ancestors."² The Secretary of Defense or other high-ranking DoD official should consider addressing a future NCAI convention to convey DoD's commitment to implementing the President's April 29, 1994 memorandum and to communicate DoD's intention to implement the policies.

- In consultation with federally recognized Indian tribes and other appropriate Native American groups, the Army historian or a panel of military historians should develop materials that will enable DoD personnel to understand and to respond to questions from both the Native American community and the public regarding the army's historical role in implementing Congress' 18th and 19th century Indian policies.

In summary, DoD should expect that Native American affairs will increase in importance. The need to fulfill a few loosely enforced statutes is evolving to a larger awareness involving core DoD interests and goals. DoD will need to develop new capabilities and an increased level of organizational attention.

²Office of the White House Press Secretary, *Remarks as Prepared for Delivery by Vice-President Al Gore at National Congress of American Indians*, Denver, Colorado, November 18, 1994.

Appendix

**SECRETARY OF THE INTERIOR OCTOBER 21, 1993 LIST
OF FEDERALLY RECOGNIZED INDIAN TRIBES**

**Indian Tribal Entities Within the Contiguous 48 States Recognized
and Eligible to Receive Services from the United States Bureau of
Indian Affairs**

Absentee-Shawnee Tribe of Indians of Oklahoma	Arapahoe Tribe of the Wind River Reservation, Wyoming
Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California	Aroostook Band of Micmac Indians of Maine
Ak Chin Indian Community of Papago Indians of the Maricopa, Ak Chin Reservation, Arizona	Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana
Alabama and Coushatta Tribes of Texas	Augustine Band of Cahuilla Mission Indians of the Augustine Reservation, California
Alabama-Quassarte Tribal Town of the Creek Nation of Oklahoma	Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
Alturas Rancheria of Pit River Indians of California	Bay Mills Indian Community of the Sault Ste. Marie Band of Chippewa Indians, Bay Mills Reservation, Michigan
Apache Tribe of Oklahoma	

Berry Creek Rancheria of Maidu Indians of California	Community of the Colusa Rancheria, California
Big Lagoon Rancheria of Smith River Indians of California	Caddo Indian Tribe of Oklahoma
Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California	Cahuilla Band of Mission Indians of the Cahuilla Reservation, California
Big Sandy Rancheria of Mono Indians of California	Cahto Indian Tribe of the Laytonville Rancheria, California
Big Valley Rancheria of Pomo & Pit River Indians of California	Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California
Blackfeet Tribe of the Blackfeet Indian Reservation of Montana	Capitan Grande Band of Diegueno Mission Indians of California:
Blue Lake Rancheria of California	Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California
Bridgeport Paiute Indian Colony of California	Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California
Buena Vista Rancheria of Me- Wuk Indians of California	Cayuga Nation of New York
Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon	Cedarville Rancheria of Northern Paiute Indians of California
Cabazon Band of Cahuilla Mission Indians of the Cabazon Reservation, California	Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
Cachil DeHe Band of Wintun Indians of the Colusa Indian	

Cher-Ae Heights Indian Community of the Trinidad Rancheria, California	Cold Springs Rancheria of Mono Indians of California
Cherokee Nation of Oklahoma	Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
Cheyenne-Arapaho Tribes of Oklahoma	Comanche Indian Tribe of Oklahoma
Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota	Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana
Chickasaw Nation of Oklahoma	Confederated Tribes of the Chehalis Reservation, Washington
Chicken Ranch Rancheria of Me-Wuk Indians of California	Confederated Tribes of the Colville Reservation, Washington
Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana	Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon
Chitimacha Tribe of Louisiana	Confederated Tribes of the Goshute Reservation, Nevada and Utah
Choctaw Nation of Oklahoma	Confederated Tribes of the Grand Ronde Community of Oregon
Citizen Band Potawatomi Indian Tribe of Oklahoma	Confederated Tribes of the Siletz Reservation, Oregon
Cloverdale Rancheria of Pomo Indians of California	Confederated Tribes of the Umatilla Reservation, Oregon
Coast Indian Community of Yurok Indians of the Resighini Rancheria, California	
Cocopah Tribe of Arizona	
Coeur D'Alene Tribe of the Coeur D'Alene Reservation, Idaho	

Confederated Tribes of the Warm Springs Reservation of Oregon	Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota
Confederated Tribes and Bands of the Yakima Indian Nation of the Yakima Reservation, Washington	Dry Creek Rancheria of Pomo Indians of California
Coquille Tribe of Oregon	Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada
Cortina Indian Rancheria of Wintun Indians of California	Eastern Band of Cherokee Indians of North Carolina
Coushatta Tribe of Louisiana	Eastern Shawnee Tribe of Oklahoma
Covelo Indian Community of the Round Valley Reservation, California	Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California
Cow Creek Band of Umpqua Indians of Oregon	Elk Valley Rancheria of Smith River Tolowa Indians of California
Coyote Valley Band of Pomo Indians of California	Ely Shoshone Tribe of Nevada
Creek Nation of Oklahoma	Enterprise Rancheria of Maidu Indians of California
Crow Tribe of Montana	Flandreau Santee Sioux Tribe of South Dakota
Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota	Forest County Potawatomi Community of Wisconsin Potawatomi Indians, Wisconsin
Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation, California	Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
Death Valley Timbi-Sha Shoshone Band of California	
Delaware Tribe of Western Oklahoma	

Fort Bidwell Indian
Community of Paiute
Indians of the Fort Bidwell
Reservation, California

Fort Independence Indian
Community of Paiute
Indians of the Fort
Independence Reservation,
California

Fort McDermitt Paiute and
Shoshone Tribes of the Fort
McDermitt Indian
Reservation, Nevada

Fort McDowell Mohave-
Apache Indian Community
of the Fort McDowell Indian
Reservation, Arizona

Fort Mojave Indian Tribe of
Arizona

Fort Sill Apache Tribe of
Oklahoma

Gila River Pima-Maricopa
Indian Community of the
Gila River Indian
Reservation of Arizona

Grand Traverse Band of
Ottawa & Chippewa Indians
of Michigan

Greenville Rancheria of Maidu
Indians of California

Grindstone Indian Rancheria
of Wintun-Wailaki Indians
of California

Guidiville Rancheria of
California

Hannahville Indian
Community of Wisconsin

Potawatomie Indians of
Michigan

Havasupai Tribe of the
Havasupai Reservation,
Arizona

Hoh Indian Tribe of the Hoh
Indian Reservation,
Washington

Hoopa Valley Tribe of the
Hoopa Valley Reservation,
California

Hopi Tribe of Arizona

Hopland Band of Pomo
Indians of the Hopland
Rancheria, California

Houlton Band of Maliseet
Indians of Maine

Hualapai Tribe of the
Hualapai Indian
Reservation, Arizona

Inaja Band of Diegueno
Mission Indians of the Inaja
and Cosmit Reservation,
California

Iowa Tribe of Kansas and
Nebraska

Iowa Tribe of Oklahoma

Jackson Rancheria of Me-Wuk Indians of California	Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas
Jamestown Klallam Tribe of Washington	Kickapoo Tribe of Oklahoma
Jamul Indian Village of California	Kickapoo Traditional Tribe of Texas
Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico	Kiowa Indian Tribe of Oklahoma
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona	Klamath Indian Tribe of Oregon
Kalispel Indian Community of the Kalispel Reservation, Washington	Kootenai Tribe of Idaho
Karuk Tribe of California	La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California
Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California	La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California
Kaw Indian Tribe of Oklahoma	La Courte Oreilles Band of Lake Superior Chippewa Indians of the Lac Courte Oreilles Reservation of Wisconsin
Keweenaw Bay Indian Community of L'Anse and Ontonagon Bands of Chippewa Indians of the L'Anse Reservation, Michigan	Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin
Kialegee Tribal Town of the Creek Indian Nation of Oklahoma	Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan

Las Vegas Tribe of Paiute
Indians of the Las Vegas
Indian Colony, Nevada

Los Coyotes Band of Cahuilla
Mission Indians of the Los
Coyotes Reservation,
California

Lovelock Paiute Tribe of the
Lovelock Indian Colony,
Nevada

Lower Brule Sioux Tribe of the
Lower Brule Reservation,
South Dakota

Lower Elwha Tribal
Community of the Lower
Elwha Reservation,
Washington

Lower Sioux Indian
Community of Minnesota
Mdewakanton Sioux Indians
of the Lower Sioux
Reservation in Minnesota

Lummi Tribe of the Lummi
Reservation, Washington

Lytton Rancheria of California

Makah Indian Tribe of the
Makah Indian Reservation,
Washington

Manchester Band of Pomo
Indians of the Manchester-
Point Arena Rancheria,
California

Manzanita Band of Diegueno
Mission Indians of the
Manzanita Reservation,
California

Mashantucket Pequot Tribe of
Connecticut

Mechoopda Indian Tribe of
Chico Rancheria, California

Menominee Indian Tribe of
Wisconsin

Mesa Grande Band of
Diegueno Mission Indians
of the Mesa Grande
Reservation, California

Mescalero Apache Tribe of the
Mescalero Reservation, New
Mexico

Miami Tribe of Oklahoma

Miccosukee Tribe of Indians
of Florida

Middletown Rancheria of
Pomo Indians of California

Minnesota Chippewa Tribe,
Minnesota (Six component
reservations: Bois Forte
Band [Nett Lake]; Fond du
Lac Band; Grand Portage
Band; Leech Lake Band;
Mille Lac Band; White Earth
Band)

Mississippi Band of Choctaw
Indians, Mississippi

Moapa Band of Paiute Indians
of the Moapa River Indian
Reservation, Nevada

Modoc Tribe of Oklahoma

Mooretown Rancheria of
Maidu Indians of California

Morong Band of Cahuilla
Mission Indians of the
Morongo Reservation,
California

Muckleshoot Indian Tribe of
the Muckleshoot
Reservation, Washington

Narragansett Indian Tribe of
Rhode Island

Navajo Tribe of Arizona, New
Mexico & Utah

Nez Perce Tribe of Idaho

Nisqually Indian Community
of the Nisqually Reservation,
Washington

Nooksack Indian Tribe of
Washington

Northern Cheyenne Tribe of
the Northern Cheyenne
Indian Reservation,
Montana

Northfork Rancheria of Mono
Indians of California

Northwestern Band of
Shoshoni Indians of Utah
(Washakie)

Oglala Sioux Tribe of the Pine
Ridge Reservation, South
Dakota

Omaha Tribe of Nebraska

Oneida Nation of New York

Oneida Tribe of Wisconsin

Onondaga Nation of New York

Osage Tribe of Oklahoma

Ottawa Tribe of Oklahoma

Otoe-Missouria Tribe of
Oklahoma

Paiute Indian Tribe of Utah

Paiute-Shoshone Indians of
the Bishop Community of
the Bishop Colony,
California

Paiute-Shoshone Tribe of the
Fallon Reservation and
Colony, Nevada

Paiute-Shoshone Indians of
the Lone Pine Community
of the Lone Pine Rserveation,
California

Pala Band of Luiseno Mission
Indians of the Pala
Reservation, California

Pascua Yaqui Tribe of Arizona

Passamaquoddy Tribe of Maine	Gamble Reservation, Washington
Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California	Potter Valley Rancheria of Pomo Indians of California
Pawnee Indian Tribe of Oklahoma	Prairie Band of Potawatomi Indians of Kansas
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California	Prairie Island Indian Community of Minnesota Mdewakanton Sioux Indians of the Prairie Island Reservation, Minnesota
Penobscot Tribe of Maine	Pueblo of Acoma, New Mexico
Peoria Tribe of Oklahoma	Pueblo of Cochiti, New Mexico
Picayune Rancheria of Chukchansi Indians of California	Pueblo of Jemez, New Mexico
Pinoleville Rancheria of Pomo Indians of California	Pueblo of Isleta, New Mexico
Pit River Tribe of California (includes Big Bend, Lookout, Montgomery Creek & Roaring Creek Rancherias & XL Ranch)	Pueblo of Laguna, New Mexico
Poarch Band of Creek Indians of Alabama	Pueblo of Nambe, New Mexico
Ponca Tribe of Indians of Oklahoma	Pueblo of Picuris, New Mexico
Ponca Tribe of Nebraska	Pueblo of Pojoaque, New Mexico
Port Gamble Indian Community of the Port	Pueblo of San Felipe, New Mexico
	Pueblo of San Juan, New Mexico
	Pueblo of San Ildefonso, New Mexico
	Pueblo of Sandia, New Mexico

Pueblo of Santa Ana, New Mexico	Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
Pueblo of Santa Clara, New Mexico	Red Lake Band of Chippewa Indians of the Red Lake Reservation, Minnesota
Pueblo of Santo Domingo, New Mexico	Redding Rancheria of Pomo Indians of California
Pueblo of Taos, New Mexico	Redwood Valley Rancheria of Pomo Indians of California
Pueblo of Tesuque, New Mexico	Reno-Sparks Indian Colony, Nevada
Pueblo of Zia, New Mexico	Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California
Puyallup Tribe of the Puyallup Reservation, Washington	Robinson Rancheria of Pomo Indians of California
Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Washington	Rohnerville Rancheria of Bear River or Mattole Indians of California
Quapaw Tribe of Oklahoma	Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
Quartz Valley Rancheria of Karok, Shasta & Upper Klamath Indians of California	Rumsey Indian Rancheria of Wintun Indians of California
Quechan Tribe of the Fort Yuma Indian Reservation, California	Sac & Fox Tribe of Mississippi in Iowa
Quileute Tribe of the Quileute Reservation, Washington	Sac & Fox Tribe of Missouri in Kansas and Nebraska
Quinault Tribe of the Quinault Reservation, Washington	Sac & Fox Tribe of Oklahoma
Ramona Band or Village of Cahuilla Mission Indians of California	

Saginaw Chippewa Indian Tribe of Michigan, Isabella Reservation	Santee Sioux Tribe of the Santee Reservation of Nebraska
Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona	Sauk-Suiattle Indian Tribe of Washington
San Carlos Apache Tribe of the San Carlos Reservation, Arizona	Sault Ste. Marie Tribe of Chippewa Indians of Michigan
San Juan Southern Paiute Tribe of Arizona	Scotts Valley Band of Pomo Indians of California
San Manual Band of Serrano Mission Indians of the San Manual Reservation, California	Seminole Nation of Oklahoma
San Pasqual Band of Diegueno Mission Indians of California	Seminole Tribe of Florida, Dania, Big Cypress & Brighton Reservations
Santa Rosa Indian Community of the Santa Rosa Rancheria, California	Seneca Nation of New York
Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation, California	Seneca-Cayuga Tribe of Oklahoma
Santa Ynez Band of Chumash Mission Indians of the Santa Ysabel Reservation, California	Shakopee Mdewakanton Sioux Community of Minnesota (Prior Lake)
Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California	Sheep Ranch Rancheria of Me-Wuk Indians of California
	Sherwood Valley Rancheria of Pomo Indians of California
	Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California

Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington	Spokane Tribe of the Spokane Reservation, Washington
Shoshone Tribe of the Wind River Reservation, Wyoming	Squaxin Island Tribe of the Squaxin Island Reservation, Washington
Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho	St. Croix Chippewa Indians of Wisconsin, St. Croix Reservation
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada	St. Regis Band of Mohawk Indians of New York
Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota	Standing Rock Sioux Tribe of North & South Dakota
Skokomish Indian Tribe of the Skokomish Reservation, Washington	Stockbridge-Munsee Community of Mohican Indians of Wisconsin
Skull Valley Band of Goshute Indians of Utah	Stillaguamish Tribe of Washington
Smith River Rancheria of California	Summit Lake Paiute Tribe of Nevada
Soboba Band of Luiseno Mission Indians of the Soboba Reservation, California	Suquamish Indian Tribe of the Port Madison Reservation, Washington
Sokoagon Chippewa Community of the Mole Lake Band of Chippewa Indians, Wisconsin	Susanville Indian Rancheria of Paiute, Maidu, Pit River & Washoe Indians of California
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado	Swinomish Indians of the Swinomish Reservation, Washington
	Sycuan Band of Diegueno Mission Indians of California

Table Bluff Rancheria of Wiyot
Indians of California

Table Mountain Rancheria of
California

Te-Moak Tribes of Western
Shoshone Indians of Nevada

Thlopthlocco Tribal Town of
the Creek Nation of
Oklahoma

Three Affiliated Tribes of the
Fort Berthold Reservation,
North Dakota

Tohono O'odham Nation of
Arizona (formerly known as
the Papago Tribe of the
Sells, Gila Bend & San Xavier
Reservation, Arizona)

Tonawanda Band of Seneca
Indians of New York

Tonkawa Tribe of Indians of
Oklahoma

Tonto Apache Tribe of Arizona

Torres-Martinez Band of
Cahuilla Mission Indians of
California

Tule River Indian Tribe of the
Tule River Reservation,
California

Tulalip Tribes of the Tulalip
Reservation, Washington

Tunica-Biloxi Indian Tribe of
Louisiana

Tuolumne Band of Me-Wuk
Indians of the Tuolumne
Rancheria of California

Turtle Mountain Band of
Chippewa Indians of North
Dakota

Tuscarora Nation of New York

Twenty-Nine Palms Band of
Luiseno Mission Indians of
California

United Keetoowah Band of
Cherokee Indians of
Oklahoma

Upper Lake Band of Pomo
Indians of Upper Lake
Rancheria of California

Upper Sioux Indian
Community of the Upper
Sioux Reservation,
Minnesota

Upper Skagit Indian Tribe of
Washington

Ute Indian Tribe of the Uintah
& Ouray Reservation, Utah

Ute Mountain Tribe of the Ute
Mountain Reservation,
Colorado, New Mexico &
Utah

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California	Wisconsin Winnebago Indian Tribe of Wisconsin
Walker River Paiute Tribe of the Walker River Reservation, California	Wyandotte Tribe of Oklahoma
Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts	Yankton Sioux Tribe of South Dakota
Washoe Tribe of Nevada & California (Carson Colony, Dresslerville & Washoe Ranches)	Yavapai-Apache Indian Community of the Camp Verde Reservation, Arizona
White Mountain Apache Tribe of the Fort Apache Reservation, Arizona	Yavapai-Prescott Tribe of the Yavapai Reservation, Arizona
Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie) of Oklahoma	Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada
Winnebago Tribe of Nebraska	Yomba Shoshone Tribe of the Yomba Reservation, Nevada
Winnemucca Indian Colony of Nevada	Ysleta Del Sur Pueblo of Texas
	Yurok Tribe of the Hoopa Valley Reservation, California
	Zuni Tribe of the Zuni Reservation, New Mexico

**Native Entities Within the State of Alaska Recognized and Eligible
To Receive Services from the United States Bureau of Indian Affairs**

Village of Afognak	Village of Alakanuk
Native Village of Akhiok	Alatna Village
Akiachak Native Community	Native Village of Aleknagik
Akiak Native Community	Algaaciq Native Village (St. Mary's)
Native Village of Akutan	

Allakaket Village	Village of Chefornek
Native Village of Ambler	Chevak Native Village
Village of Anaktuvuk Pass	Chickaloon Native Village
Yupiit of Andreafski	Native Village of Chignik
Angoon Community Association	Native Village of Chignik Lagoon
Village of Aniak	Chignik Lake Village
Anvik Village	Chilkat Indian Village (Kluckwan)
Arctic Village (See Native Village of Venetie Tribal Government)	Chilkoot Indian Association (Haines)
Native Village of Atka	Chinik Eskimo Community (Golovin)
Atkasuk Village (Atkasook)	Native Village of Chistochina
Village of Atmautluak	Native Village of Chitina
Native Village of Barrow	Native Village of Chuatbaluk (Russian Mission, Kuskokwim)
Beaver Village	Chuloonawick Native Village
Native Village of Belkofski	Circle Native Community
Village of Bill Moore's Slough	Village of Clark's Point
Birch Creek Village	Native Village of Council
Native Village of Brevig Mission	Craig Community Association
Native Village of Buckland	Village of Crooked Creek
Native Village of Cantwell	Native Village of Deering
Native Village of Chanega (aka Chenega)	Native Village of Dillingham
Chalkyitsik Village	

Native Village of Diomedes (aka Inalik)	Native Village of Hamilton
Village of Dot Lake	Healy Lake Village
Douglas Indian Association	Holy Cross Village
Native Village of Eagle	Hoonah Indian Association
Native Village of Eek	Native Village of Hooper Bay
Egegik Village	Hughes Village
Eklutna Native Village	Huslia Village
Native Village of Elim	Hydaburg Cooperative Association
Emmonak Village	Igiugig Village
Evansville Village (aka Bettles Field)	Village of Iliamna
Native Village of Eyak (Cordova)	Inupiat Community of the Arctic Slope
Native Village of False Pass	Ivanoff Bay Village
Native Village of Fort Yukon	Kaguyak Village
Native Village of Gakona	Organized Village of Kake
Galena Village (aka Loudens Village)	Kaktovik Village (aka Barter Island)
Native Village of Gambell	Village of Kalskag
Native Village of Georgetown	Village of Kaltag
Native Village of Goodnews Bay	Native Village of Kanatak
Organized Village of Grayling (aka Holikachuk)	Native Village of Karluk
Gulkana Village	Organized Village of Kasaan
	Native Village of Kasigluk
	Kenaitze Indian Tribe

Ketchikan Indian Corporation	Levelock Village
Native Village of Kiana	Lesnoi Village (aka Woody Island)
Agdaagux Tribe of King Cove	Lime Village
King Island Native Community	Village of Lower Kalskag
Native Village of Kipnuk	Manley Hot Springs Village
Native Village of Kivalina	Manokotak Village
Klawock Cooperative Association	Native Village of Marshall (aka Fortuna Ledge)
Native Village of Kluti Kaah (aka Copper Center)	Native Village of Mary's Igloo
Knik Village	McGrath Native Village
Native Village of Kobuk	Native Village of Mekoryuk
Kokhanok Village	Mentasta Lake Village
Koliganek Village	Metlakatla Indian Community, Annette Island Reserve
Native Village of Kongiganak	Native Village of Minto
Village of Kotlik	Native Village of Mountain Village
Native Village of Kotzebue	Naknek Native Village
Native Village of Koyuk	Native Village of Nanwalek (aka English Bay)
Koyukuk Native Village	Native Village of Napaimute
Organized Village of Kwethluk	Native Village of Napakiak
Native Village of Kwigillingok	Native Village of Napaskiak
Native Village of Kwinhagak (aka Quinhagak)	Native Village of Nelson Lagoon
Native Village of Larsen Bay	

Nenana Native Association	Pedro Bay Village
New Stuyahok Village	Native Village of Perryville
Newhalen Village	Petersburg Indian Association
Newtok Village	Native Village of Pilot Point
Native Village of Nightmute	Pilot Station Traditional Village
Nikolai Village	Native Village of Pitka's Point
Native Village of Nikolski	Platinum Traditional Village
Ninilchik Village	Native Village of Point Hope
Native Village of Noatak	Native Village of Point Lay
Nome Eskimo Community	Native Village of Port Graham
Nondalton Village	Native Village of Port Heiden
Noorvik Native Community	Native Village of Port Lions
Northway Village	Portage Creek Village (aka Ohgsenakale)
Native Village of Nuiqsut (aka Nooiksut)	Pribilof Islands Aleut Communities of St. Paul & St. George Islands
Nulato Village	Qagan Toyagungin Tribe of Sand Point Village
Native Village of Nunapitchuk	Rampart Village
Village of Ohogamiut	Village of Red Devil
Village of Old Harbor	Native Village of Ruby
Orutsararmuit Native Village (aka Bethel)	Native Village of Russian Mission (Yukon)
Oscarville Traditional Village	Village of Salamatoff
Native Village of Ouzinkie	
Native Village of Paimiut	
Pauloff Harbor Village	

Organized Village of Saxman	Native Village of Stevens
Native Village of Savoonga	Village of Stony River
Saint George (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)	Takotna Village
Native Village of Saint Michael	Native Village of Tanacross
Saint Paul (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)	Native Village of Tanana
Native Village of Scammon Bay	Native Village of Tatitlek
Native Village of Selawik	Native Village of Tazlina
Seldovia Village Tribe	Telida Village
Shageluk Native Village	Native Village of Teller
Native Village of Shaktoolik	Native Village of Tetlin
Native Village of Sheldon's Point	Traditional Village of Togiak
Native Village of Shishmaref	Native Village of Toksook Bay
Native Village of Shungnak	Tuluksak Native Community
Sitka Tribe of Alaska	Native Village of Tuntutuliak
Skagway Village	Native Village of Tununak
Village of Sleetmute	Twin Hills Village
Village of Solomon	Native Village of Tyonek
South Naknek Village	Ugashik Village
Stebbins Community Association	Umkumiute Native Village
	Native Village of Unalakleet
	Qawalingin Tribe of Unalaska
	Native Village of Unga
	Village of Venetie (See Native Village of Venetie Tribal Government)

Native Village of Venetie
Tribal Government (Arctic
Village and Village of
Venetie)

Village of Wainwright

Native Village of Wales

Native Village of White
Mountain

Wrangell Cooperative
Association

Yakutat Tlingit Tribe

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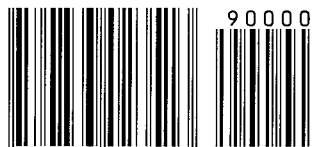
Our first principle must be to respect your right to remain who you are, and to live the way you wish to live . . . Today I reaffirm our commitment to self-determination for tribal governments. I pledge to fulfill the trust obligations of the federal government . . . It is the entire government, not simply the Department of the Interior, that has a trust responsibility with tribal governments. And it is time the entire government recognized and honored that responsibility.

—President Bill Clinton,
Address to American Indian and Alaska Native Tribal Leaders,
April 29, 1994

In Spring 1994, President Clinton met with his cabinet and 300 Native American leaders to express his commitment to safeguarding Native American religions and cultures and improving the economic status of tribal members, and to charge every executive branch department with the responsibility of fulfilling this mandate. But what will be the practical implications of such a mandate? Specifically, how will recent statutes and regulations affecting Native Americans affect the Department of Defense, considering its unique relationship with—and historical role in—Indian affairs?

Native American Affairs describes both the growing public awareness of Native American issues and the expanding ability of Native American leaders to influence public land-use policies affecting Native Americans. It offers sound guidelines for implementing President Clinton's directives regarding issues of land-use goals, the protection of artifacts, religious sites, and historical monuments, and the claims of Native American groups that have not been recognized as tribes by the federal government. Native American affairs will be of growing importance in the coming decade, and the Department of Defense will play a key role in addressing those issues.

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